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REPORTS OF CASES

UNDER THE

BANKRUPTCY ACT, 1883,

DECIDED IN THE

High Court of Justice & The Court of Appeal.

REPORTED BY

CHARLES FRANCIS MORRELL,

*Of the Middle Temple, Barrister-at-Law.*

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VOL. III.

COMPRISING CASES DECIDED DURING THE YEAR 1886,

TOGETHER WITH

*A Complete Digest and Index.*

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LONDON :

H. SWEET & SONS, 3, CHANCERY LANE,  
Law Publishers.

1887.

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## NOTE.

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CASES OVERRULED.

- (1) The case of *In re Wise, Ex parte Brown*, reported at page 123 of this Volume, is overruled as to the question of jurisdiction of the Divisional Court by the case of *In re Wise, Ex parte Rowland*, reported at page 174.
- (2) The decision in the case of *Colonial Bank v. Whinney*, reported in Volume II., at page 234, is overruled by the *Colonial Bank v. Whinney*, reported at page 207 of the present Volume.

REPORTS OF CASES

DECIDED UNDER THE

BANKRUPTCY ACT, 1883.

IN RE HAWKE, EX PARTE SCOTT AND SMITH.

*Bankruptcy Act, 1883, section 102.*

*Jurisdiction—Claim arising out of the bankruptcy.*

DIVISIONAL  
COURT.

BEFORE  
CAVE, J.,  
and  
DAY, J.  
1885.

December 9th.

On June 8th, 1885, the manager of the debtor, without his knowledge, communicated to a firm of corn-factors, to whom the debtor was indebted for wheat then in his stores, the fact that the debtor was in difficulties, and the firm thereupon bought from the manager all the wheat in the debtor's stores on the usual credit terms.

On the same day the debtor sent out by post from another place notices of suspension of payment, which were delivered on the following morning to the creditors and also to the debtor's manager.

On the facts of the sale of the wheat coming to the knowledge of the debtor he repudiated the transaction, and it was subsequently set aside by the County Court Judge.

At the hearing it was objected that the claim did not arise out of the bankruptcy, and as the amount in dispute exceeded £200, and all parties did not consent, the County Court had no jurisdiction.

*Held* (on Appeal): That the claim did arise out of the bankruptcy: that but for the impending bankruptcy the transaction would never have taken place, and but for the actual bankruptcy it would never have been disputed: and that the decision of the County Court Judge was right.

THIS was an appeal by Messrs. *Scott & Smith* against an order of the learned judge of the Salisbury County Court allowing an application of the trustee in the bankruptcy of *Hawke* that the sale of certain wheat by the manager of the bankrupt on June 8th, 1885, to Messrs. *Scott & Smith*, be declared void, and that such wheat be returned or its value of 409*l.* 10*s.* be paid to such trustee.

1885.  
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 IN RE  
 HAWKE,  
 EX PARTE  
 SCOTT & SMITH

Messrs. *Scott & Smith* were corn-factors carrying on business at Warminster, and the bankrupt, *Hawke*, was a corn-merchant carrying on business at Salisbury, where he lived, and also possessing stores at Southampton, where the business was under the charge of one *Stapleton* as manager.

In April, 1885, the bankrupt purchased from Messrs. *Scott & Smith* a quantity of wheat on usual terms—payment by bill at two months—which was sent to the debtor's stores at Southampton, where 200 qrs. of it remained until June 8th.

On June 8th, in consequence of a telegram in the following form, "I want to see you particularly to-day," sent by *Stapleton* to Messrs. *Scott & Smith*, to whom the bankrupt was largely indebted, Mr. *Smith*, one of the members of the firm, went to Southampton, where he learned from *Stapleton* that *Hawke* was in difficulties, and it was arranged between them that Messrs. *Scott & Smith* should purchase the 200 qrs. of wheat in question from the manager on usual terms. Bought and sold notes were made out accordingly, dated June 8th, and signed by *Stapleton* as agent for *Hawke*.

This transaction was not known to the bankrupt, who on the same day—June 8th—sent out by post from Salisbury notices of suspension of payment, which were delivered the following morning.

The learned County Court Judge, on the application of the trustee in the bankruptcy, subsequently set aside the sale of the wheat, on the ground that it was contrary to the policy of the bankruptcy laws.

During the hearing it was objected that the claim did not arise out of the bankruptcy at all, and as the amount in dispute exceeded 200*l.*, and all parties did not consent, the County Court had no jurisdiction.

Section 102 of the Bankruptcy Act, 1883, provides: "(1) Subject to the provisions of this Act, every Court having jurisdiction in bankruptcy under this Act shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, which may arise in any case of bankruptcy coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice, or making a complete distribution of property in any such case. Provided that the jurisdiction hereby given shall not be

exercised by the County Court for the purpose of adjudicating upon any claim, not arising out of the bankruptcy, which might heretofore have been enforced by action in the High Court, unless all parties to the proceeding consent thereto, or the money, money's worth, or right in dispute, does not, in the opinion of the judge, exceed in value two hundred pounds."

1855.  
IN RE  
HAWKE,  
EX PARTE  
SCOTT & SMITH

Messrs. *Scott & Smith* now appealed.

*Herbert Reed* (*Rubie* with him) for the appellants.

\* \* \* \* \* In the Court below the objection was taken to the jurisdiction on the ground that this was not a matter arising out of the bankruptcy. At any rate it does not come under the head of fraud against the bankruptcy laws. That only extends to cases in which the bankrupt himself is a party to the fraud.

*E. Cooper Willis*, Q.C. (*F. C. Willis* with him), for the trustee.

The chief point is the question of jurisdiction. It is really only necessary to look at the facts of the case to show that the matter was one arising out of the bankruptcy. It is obvious that but for the impending bankruptcy the sale would not have taken place. The creditor induced the debtor's servant to commit a fraud against the bankruptcy laws. It is quite true, as my friend has stated, that the majority of the authorities deal with cases in which the bankrupt himself has been a party to the fraud. But that is only because in by far the greater number of cases it is natural that the bankrupt should be a party. It is to his interest to obviate the operation of the law. But there is nothing to show that a fraud against the bankruptcy laws can only occur where the bankrupt himself is a party to the fraud. (Counsel also referred to *Ex parte Dickin*, *In re Pollard*, L. R. 8 Ch. Div. 377; 38 L. T. 860; *Ex parte Pearson*, *In re Mortimer*, L. R. 8 Ch. App. 667; 42 L. J. Bank. 44; 28 L. T. 796.)

CAVE., J. :

The main question in this case is whether the County Court had jurisdiction under the Act of Parliament. I am of opinion that it

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 IN RE  
 HAWKE,  
 EX PARTE  
 SCOTT & SMITH

had jurisdiction. Section 102, sub-section (1) of the Bankruptcy Act, 1883, runs as follows:—"Subject to the provisions of this Act, every Court having jurisdiction in bankruptcy under this Act shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, which may arise in any case of bankruptcy coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case." This sub-section, if it stood by itself, would be abundantly sufficient to confer the jurisdiction. But the question arises whether that jurisdiction is narrowed by the proviso which runs thus, "Provided that the jurisdiction hereby given shall not be exercised by the County Court for the purpose of adjudicating upon any claim, not arising out of the bankruptcy, which might heretofore have been enforced by action in the High Court, unless all parties to the proceeding consent thereto, or the money, money's worth, or right in dispute does not, in the opinion of the judge, exceed in value two hundred pounds." In the present case there was no consent to the jurisdiction, and the amount in dispute was considerably over £200. The question therefore arises, whether the matter was one arising out of the bankruptcy. Now it seems to me quite evident that, but for the bankruptcy, the transaction with reference to which the present dispute has arisen would never have taken place. It was the knowledge of the impending bankruptcy which induced *Stapleton* to send the telegram to Messrs. *Scott & Smith*. His tactics were not wanting in ingenuity, and if his object was to benefit himself, they were so far successful, for we learn that he is now in the employment of Messrs. *Scott & Smith*. It cannot be contended that this sale of the wheat was a sale in the ordinary course of business. This is proved by the conduct of the debtor himself. The transaction was not known to him, and was repudiated by him. In one of his letters he writes, "This is a matter which must be enquired into by the official receiver." Under the circumstances therefore I fail to see how we can say that this is not a matter arising out of the bankruptcy. In my opinion the case did arise out of the bankruptcy, inasmuch as but for the impending bankruptcy the transaction would never have

taken place, and but for the actual bankruptcy it would never have been disputed. There is a vast difference between such a claim as this and one which is genuinely prior to the bankruptcy. On the facts of this case we are of opinion that the County Court Judge came to a right conclusion that a fraud against the bankruptcy laws had been committed, and the appeal must be dismissed with costs.

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IN RE  
HAWKE,  
EX PARTE  
SCOTT & SMITH

DAY, J., concurred.

*Appeal dismissed with costs.*

Solicitors : *Crowder, Anstie & Vizard*, for Messrs. Scott & Smith.  
*Hacon & Turner*, for the trustee.

Cases relied upon or referred to :—

*Ex parte Dickin, In re Pollard*, L. R. 8 Ch. Div. 377 ; 38 L. T. 860.

*Ex parte Pearson, In re Mortimer*, L. T. 8 Ch. App. 667 ; 42 L. J. Bank. 44 ; 28 L. T. 796.

## BUTLER v. WEARING.

*Bankruptcy Act, 1883, section 45, sub-section (2).*

BEFORE  
MR. JUSTICE  
MANISTY.  
1885.

*Attachment—Payment into Court to abide further order—"Receipt of debt."*

December 9th  
and 16th.

Where a judgment creditor obtained a garnishee order in respect of a debt due to the judgment debtor, and a dispute having arisen, payment into Court of the debt to abide further order was directed, and the judgment debtor subsequently became bankrupt.

*Held* : (1) That such payment into Court to abide further order did not constitute a "receipt of the debt" by which an attachment is completed within section 45, sub-section (2) of the Bankruptcy Act, 1883.

(2) That the meaning and intention of the legislature by the Bankruptcy Act, 1883, was to get rid of all questions which might have arisen before that Act was passed, and to put the law upon a very simple and

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BUTLER  
v. WEARING.

plain foundation : and that a judgment creditor having attached a debt does not become entitled to retain it unless he has received the debt before the bankruptcy.

THIS was an Interpleader Issue directed by the Court to decide the right to the sum of 46*l.* 1*s.* 11*d.*, attached in the hands of one *William Nelson*, and ordered to be paid into Court to abide further order.

The case raised an important question whether payment into Court to abide further order was, under the circumstances, a "receipt of the debt," within section 45, sub-section (2), of the Bankruptcy Act, 1883.

Section 45 provides "(1) Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor. (2) For the purposes of this Act, an execution against goods is completed by seizure and sale: an attachment of a debt is completed by receipt of the debt: and an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver."

On April 15th, 1885, *William Wearing* recovered judgment against *William Jackson*, a tanner, at Dalton-in-Furness, for the sum of 71*l.* 19*s.* 10*d.*

*Jackson* was a lunatic not so found by inquisition, and Mrs. *Jackson* his wife was guardian *ad litem*, and was managing the business, in the course of which she had consigned hides to one *William Nelson* in her own name, who was at this time indebted in the sum of about 46*l.* 1*s.* 11*d.*

A garnishee order in respect of this debt was obtained by *Wearing* against *Nelson*, but Mrs. *Jackson* intervened, as claimant, on the ground that the debt in question was due to her, not to her husband, and on April 22nd, 1885, an order was made directing issue to be tried, and payment into Court to abide further order.



On May 5th, 1885, *William Jackson* committed an act of bankruptcy, on which a petition was presented on May 6th; a receiving order made on May 21st; and on June 4th he was adjudicated bankrupt.

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BUTLER  
v. WEARING.

On June 15th *T. Butler* was appointed trustee in the bankruptcy.

On June 20th an order was made joining such trustee a party to the interpleader issue; and on July 8th the present issue was settled withdrawing *Mrs. Jackson*, she having no good claim, and making the trustee plaintiff.

The question, therefore, was whether *T. Butler*, the plaintiff, as trustee of the estate of *Jackson*, or whether *W. Wearing*, the defendant, who was the judgment creditor, was entitled to this sum of 46*l.* 1*s.* 11*d.* so paid into Court.

*Baldwin* for Mr. Butler, the trustee in the bankruptcy.

There was nothing in the Act of 1869 analogous to section 45 of the Bankruptcy Act, 1883. It is material to see, therefore, the state of the law under the former Act which led to the passing of the new Act. Section 45 is obviously intended to meet cases like *Ex parte Joselyne*, *In re Watt* (L. R. 8 Ch. Div. 327; 47 L. J. Bank. 91; 38 L. T. 661), and *Lowe v. Blakemore*, (L. R. 10 Q. B. 485; 44 L. J. Q. B. 55), which decided that a creditor who had served a garnishee order nisi was secured within the meaning of section 16 of the Bankruptcy Act, 1869. But the case of *Ex parte Pillers*, *In re Curtoys* (L. R. 17 Ch. Div. 653; 50 L. J. Ch. 691; 44 L. T. 691), decided that a garnishee order must be accompanied by actual payment to bring it within section 95, sub-section (3) of the Bankruptcy Act, 1869. Section 45 of the new Act practically incorporates this decision. I admit that *Ex parte Banner*, *In re Keyworth* (L. R. 9 Ch. App. 379; 43 L. J. Bank. 102; 30 L. T. 620), decides that in ordinary cases payment into Court is a security. But section 45 prevents this where the payment is part of attachment proceedings. The earlier part of the section is intended to meet cases like *Slater v. Pinder* (L. R. 6 Ex. 228; L. R. 7 Ex. 95; 24 L. T. 631; 26 L. T. 482). I submit that the intention of the legislature was to abolish this class of indirect securities. "Receipt" means manual receipt. If not, there is no constructive

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 v. WEARING.

receipt here on the facts. Payment was made to abide further order. The money could not have been paid out without order. The date of payment is to be looked at, and neither party could earmark it then as payment to his use. The trustee is not in the debtor's shoes, and claims by a higher title (*Ex parte Lennox*, see Vol. 2, p. 271). The wrongful intervention of Mrs. Jackson will not prevent the trustee claiming. In *Ex parte Halling, In re Haydon* (L. R. 7 Ch. Div. 157; 47 L. J. Bank. 25; 37 L. T. 809), the trustee was not prevented from claiming goods, by interpleader order delaying sale and recognising title of execution creditor.

*Shee* for the defendant.

Every other part of section 45 recognises the interposition of an officer of the Court. Why is not, in case of attachment, payment into Court sufficient? There is nothing in section 45 in case of execution against goods as to payment over by sheriff. It is only "seizure and sale." So also as to receiver in case of execution against land. I rely on the observations of the Court in *Emmanuel v. Bridger* (L. R. 9 Q. B. 286; 43 L. J. Q. B. 76), and in *Ex parte Joselyne, In re Watt* (L. R. 8 Ch. Div. 327; 47 L. J. Bank. 91; 38 L. T. 661), to shew the nature of a garnishee order. Mrs. Jackson's claim was groundless, and the order of April 22nd, 1885, shews that payment into Court was only to abide issue between her and the judgment creditor. The effect of payment into Court is to relate back, when the issue was decided, by Mrs. Jackson's withdrawal, to the time when payment into Court was made (Counsel referred to the cases of *Ex parte Bouchard, In re Moojen*, L. R. 12 Ch. Div. 26; 48 L. J. Bank. 105; 41 L. T. 363; *Taylor v. Marling*, 2 M. & G. 55).

*Baldwin*, in reply.

When the sheriff has sold, he holds the proceeds, subject to section 46, as agent for the execution creditor. There is, therefore, receipt there. Section 45 expressly intended to disaffirm *Emmanuel v. Bridger*, and *Ex parte Joselyne, In re Watt*. The case of *Ex parte Bouchard, In re Moojen*, was a case of a debtor's summons and debt disputed, only two parties. Here it is an inter-

pleader issue with rival claimant, and money paid to abide further order, whilst in *Ex parte Bouchard* it was paid in to abide event.

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BUTLER  
v. WEARING.

December 16th.

MANISTY, J. :

This case was an interpleader issue, and the question raised was Judgment. whether or not Mr. *Butler*, the plaintiff, as trustee of the estate of one *William Ebenezer Jackson*, or whether the defendant, Mr. *Wearing*, who was the judgment creditor of *Jackson*, was entitled to the sum of 46*l.* which had been paid into Court under the following circumstances. *Wearing* had obtained a judgment against *Jackson* for the sum of about 70*l.*, and a Mr. *Nelson* was indebted as alleged in the sum of 46*l.* 1*s.* 11*d.* or rather more than that, but that is the sum in question, and as it ultimately turned out he was indebted to *Jackson* in that sum. Under those circumstances, and believing that that was the state of things, Mr. *Wearing* obtained a garnishee order for attaching that debt owing by Mr. *Nelson* to Mr. *Jackson*. The dates are important, because the question arises, and it is a new point upon the Bankruptcy Act, as to whether, under the peculiar circumstances of this case, the trustee of *Jackson*, who went into liquidation, or whether Mr. *Wearing*, the judgment creditor and also execution creditor, is entitled to that sum or not.

Now, the judgment having been obtained, as I stated, against *Jackson*, on the 15th of April, 1885, Mr. *Wearing* obtained an ordinary *ex parte* order to attach that debt in the hands of Mr. *Nelson*, and on the 21st, six days afterwards, Mrs. *Jackson* claimed that debt. She alleged that *Nelson* owed that money to her, and not to her husband, the judgment debtor. Mr. *Nelson* admitted that he owed the debt; it was immaterial to him to whom he paid, so long as he got a proper discharge, and on the 22nd of April, 1885, he paid that 46*l.* odd into Court to abide the further order of the Court, and an order was made to which considerable importance is attached by Mr. *Shee*, who appears as counsel for Mr. *Wearing*.

Now that order of the 22nd of April was prior to the liquidation of *Jackson*, and it was in these terms. After reciting the judgment and so on, the order was "that the garnishee do within 48 hours pay into Court the sum of 49*l.* 4*s.* 11*d.* less three guineas for his

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costs,"—and that reduced it to 46*l.* 1*s.* 11*d.*—"being the net amount in the hands of the garnishee, and that such payment shall be a valid discharge to him as against his judgment creditor,"—that was Mr. *Wearing*—"and the claimant,"—that was Mrs. *Jackson*—"and all other parties, and that the residue of that sum of 46*l.* 1*s.* 11*d.* shall remain in Court to abide further order," and Mr. *Wearing* and Mrs. *Jackson* were to proceed to the trial of an issue wherein Mrs. *Jackson* was to be plaintiff, and Mr. *Wearing* was to be defendant, and the question to be tried was, whether the plaintiff or the judgment creditor was entitled to the 46*l.* 1*s.* 11*d.*

Now it is said on the part of Mr. *Wearing* that the effect of that order was to absolutely discharge Mr. *Nelson*, and that the payment of that 46*l.* 1*s.* 11*d.* into Court was a payment within the meaning of the present Bankruptcy Act. So that whoever was ultimately proved to be entitled to the money, whether it was Mrs. *Jackson* or Mr. *Wearing*, was in the same position as if the money had been paid to him or to her. The force of that will be seen when I call attention to the enactment in the Bankruptcy Act which gives rise to this question.

Now in that state of things undoubtedly Mr. *Nelson* was discharged, that is to say, he had paid it, but he had not paid it in fact either to Mr. *Wearing* or to Mrs. *Jackson*. It was paid into Court, subject to the further order of the Court. Well, after that Mr. *Jackson* went into liquidation, and the plaintiff was appointed trustee of his estate. I think on the 6th of May was the petition in bankruptcy, but on the 21st of May there was a receiving order, and on the 4th of June there was an adjudication. So that the title of Mr. *Butler*, the present plaintiff, to all the assets and estate of Mr. *Jackson* undoubtedly was then complete. I think he was appointed on the 15th of June. On the 20th of June an order was made making him a party to the issue, and soon after that Mrs. *Jackson* admitted that she had no claim—that her claim could not be supported; and on the 8th of July an order was made striking out the names both of Mr. *Jackson*, the debtor, and Mrs. *Jackson*, and a new issue was directed. That issue is the one now in question, in which Mr. *Butler*, as trustee of Mr. *Jackson*, is the plaintiff, and Mr. *Wearing*, as the execution creditor, is the defendant; and the question to be decided is, whether or not the 46*l.*

odd is the property of the trustee in bankruptcy or of the execution creditor.

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It is, I may say, a new question. In some respects it has a great resemblance to old questions, but it is really a new question. In my opinion it turns upon the meaning of the 45th section of the present Bankruptcy Act of 1883, but before I deal with that, which in the result will govern this case, and is the foundation of the judgment I am about to pronounce, I will briefly advert to the state of the law before that Act was passed. Now I do not propose to go through the cases. It would be difficult to reconcile all the decisions, as it seems to me, but the state of the law is very briefly and very concisely stated by Mr. Williams in his *Bankruptcy Practice*, which, of course, was published a good many years before the present Bankruptcy Act. That was published in 1876, and it correctly and very concisely states what the state of the law was under the Act of 1869, and even the previous Act. It is, perhaps, right and quite proper to have regard to the state of the law before the present Act passed, in order to see what it was that the Legislature really meant by the language they have used in the present Act. Now I say that the authorities are difficult to reconcile, and I do not propose to go through them. I will refer to them by and by. But the law seems to have been this, that prior to 1869 there was a provision which deprived execution creditors of the benefit of their execution if they had not realised by seizure and sale before the adjudication. That was the law prior to 1869. But the Act of 1869 contained no such provision, but it did say creditors who held security, and questions arose as to who were secured creditors, in the case of an execution against goods, or in the case of garnishee orders, and as regarded goods, it was held that if a creditor had seized, but not sold, he was a creditor holding security. I believe there was an exception if the debtor was a trader, and the execution was for more than 50*l.*, but that was as regarded seizure and sale of goods—he was a secured creditor even though he had not sold, and as regarded attachments—garnishee orders—I think, although the decisions are conflicting, the result seems to have been that until the order absolute was made and served, the garnishor did not become a secured creditor. The case of *Ex parte Joselyne, In re Watt* (L. R. 8 Ch. Div. 327), no doubt

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creates a considerable difficulty, but it seems to me, if it were necessary to consider whether that case was well decided, I should probably be inclined to hold it was not upon the recent authorities, but I do not think it is necessary to decide that. No doubt it was prior to cases which held that an order nisi made an execution creditor a secured creditor, but it stands alone, and as it seems to me it went beyond what afterwards was, I think, more correctly stated to be the law, because—and I will dispose of that at once—the case which was called to my attention in the Law Reports, 17 Ch. Div. *Ex parte Pillers, In re Curtoys*, p. 653, was the case of an attachment against goods of a bankrupt, and the question was whether or not that was a dealing which was protected, and the headnote is to this effect:—"A garnishee order attaching a debt due to a bankrupt is not a 'dealing' with the bankrupt." It was attempted to be argued it was a dealing with the bankrupt which was protected by section 94, sub-section 3. "Whether such an order is 'an attachment against goods' of a bankrupt within section 95, sub-section 3, *quære*. But if it is, it is not within the protection of section 95, sub-section 3, unless the garnishor has obtained actual payment of the attached debt from the garnishee before the order of adjudication." Now it is difficult to reconcile that case, as it seems to me, with the case of *Ex parte Joselyne, In re Watt* (L. R. 8 Ch. Div. 327). It is cited in it, and the Chief Judge in Bankruptcy, Vice-Chancellor BACON, decided in that case that the garnishor was entitled to protection, but that was appealed and reversed. I think I should adhere to the judgment of Lord Justice LUSH if it were necessary to decide it. He says, at the conclusion of a long judgment:—"The intention was that so long as the execution remained only a security for the debt it was not to be protected. Something more must have been done: there must have been an actual conversion of the security into money. And I think we must find some equivalent for that in the case of an attachment under a garnishee order. What is the equivalent? The security must have been realised before there can be any protection. How can the garnishor realise the debt which he has attached? The debt cannot be sold, and he can only realise it by obtaining payment of it from the garnishee, either voluntarily or by means of an execution on his goods. Till that has been done I

think there is no protection. It is true the words 'executed by seizure and sale' have no application to the case. But I think they do show what was the meaning of the Legislature clearly enough to enable us to apply the principle; and if for want of apt words in the section we were to say it does not apply to a garnishee order, we should be incurring the censure which is implied in the maxim *Qui hæret in literâ hæret in cortice*. I am of opinion that the only equivalent for an actual sale of goods which will satisfy the words of the Act in the case of a garnishee order is—an actual receipt of the attached debt by the garnishor." That was in the year 1881, prior of course to the present Bankruptcy Act.

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Now that being what I should be prepared to hold to be the law if it were necessary, we come to the Act in question. That of course is the 46 & 47 Vict. c. 52, section 45, "Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition," and so on. But then sub-section (2) defines what is meant by completing an attachment. For the purposes of this Act an execution against goods is to be completed by seizure and sale. An attachment of a debt, which is the present case, is completed by receipt of the debt, and the question is, what is the meaning of "receipt of the debt?" Is it, as Lord Justice LUSH says in that case to which I have just referred, an actual receipt by the garnishor, or is it a sort of constructive receipt if the money is paid into Court subject to further order? With regard to goods I need not advert to that, but upon the seizure and sale of goods there is another provision, which is in section 46, sub-section (2), which provides, that if the goods are sold under an execution for a sum exceeding 20*l.* the sheriff shall retain the balance for fourteen days to see if any petition is presented. But I need not go into that. It is a provision with regard to the seizure and sale of goods, and does not, except in so far as it may throw some light upon the question, touch the question of the attachment of a debt. This case therefore resolves

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itself into the question of what is the true construction and meaning of sub-section (2) of section 45 of the Act of 1883.

Now it was argued, and very well argued too, that when the money was paid into Court and the garnishee was discharged, that was a receipt by one of the two contending parties, who ultimately proves to be entitled to the money. Then that having ultimately been decided to be a debt due to the judgment creditor, by relation as it were, the judgment creditor having ultimately been proved to be the party entitled to it, he must be taken to have received it within the meaning of the Act at the time it was paid into Court. Now I have come to the conclusion that that is not the meaning of the Act, but that it means just what it says—that if it is the case of an attachment he shall not be entitled to retain the benefit of his attachment unless he has completed the attachment before the date of the receiving order, and so on. Then what is the meaning of completing the attachment? It is completed by the receipt of the debt. I think that the doctrine of title by relation cannot be maintained, and that the meaning and intention of the Legislature was to get rid of all questions which might have arisen before, and to put the law upon a very simple and plain foundation after that Act passed. A judgment creditor having attached a debt does not become entitled to retain it unless he has received the debt before the bankruptcy. I do not think it at all necessary to go through the numerous cases that were cited. I think that was the intention of the Legislature, and therefore, that in this case the trustee, the plaintiff, is entitled to judgment. It is a new point.

*Judgment for the plaintiff, the money to be paid out of Court, with costs.*

Solicitors: *Baileys, Shaw & Gillett*, for the plaintiff.  
*M. J. A. Dickinson* for the defendant.

Cases relied upon or referred to :—

*Ex parte Joselyne, In re Watt*, L. R. 8 Ch. Div. 327; 47 L. J. Bank. 91; 38 L. T. 661.  
*Lowe v. Blakemore*, L. R. 10 Q. B. 485; 44 L. J. Q. B. 55.



- Ex parte Pillers, In re Curtoys*, L. R. 17 Ch. Div. 653; 50 L. J. Ch. 691; 44 L. T. 691. 1835.  
*Ex parte Banner, In re Keyworth*, L. R. 9 Ch. App. 379; 43 L. J. Bank. 102; 30 L. T. 620. BUTLER  
 Slater v. Pinder, L. R. 6 Ex. 228; L. R. 7 Ex. 95; 24 L. T. 631; 26 L. T. 482. v. WEARING.  
*Ex parte Lennox*, see Vol. 2, p. 271.  
*Ex parte Halling, In re Haydon*, L. R. 7 Ch. Div. 157; 47 L. J. Bank. 25; 37 L. T. 809.  
*Emmanuel v. Bridger*, L. R. 9 Q. B. 286; 43 L. J. Q. B. 76.  
*Ex parte Bouchard, In re Moojen*, L. R. 12 Ch. Div. 26; 48 L. J. Bank. 105; 41 L. T. 363.  
*Taylor v. Marling*, 2 M. & G. 55.

## IN RE TRICKS, EX PARTE CHARLES.

*Proof of debt—Amendment—Bond fide mistake—Delay.*

BEFORE  
MR. JUSTICE  
CAVE.  
1885.

December 15th.

*Held*: That although the time allowed for appeal in bankruptcy matters may be extended by the Court, yet some ground must always be shewn why this should be done, and notwithstanding the fact that when a *bond fide* mistake has been committed in the estimation of a proof the trustee in the bankruptcy ought not to be permitted to take a technical advantage of such mistake, where a creditor for more than a year and a half took no steps to reverse the decision of the County Court Judge refusing to allow such creditor to amend or withdraw his proof alleged to be so wrongly estimated, the Court could not permit him to reopen the case for the purpose of setting aside that decision.

THIS was in effect an appeal against an order of the learned judge of the Bristol County Court refusing to allow the proof of debt sworn to by one *Charles* in the bankruptcy of *Tricks* to be taken off the file in the said bankruptcy or to be amended by the Court.

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On August 21st, 1883, the debtor *Tricks* filed a petition for liquidation under which *Charles* proved for the sum of 1775*l*.

At this time *Charles* held as security a policy of insurance on the life of *Tricks* for 1500*l*., which security he estimated at 45*l*., and put in a proof for the balance.

The liquidation proceedings subsequently fell through, and thereupon, on September 22nd, 1883, a bankruptcy petition was presented against the debtor by one *Wintle* a creditor, and on September 27th *Tricks* was adjudicated bankrupt.

On October 9th, 1883, application was made by the petitioning creditor that the proofs in the abortive liquidation proceedings might be transferred to the bankruptcy file, which was done; and on October 15th the first meeting was held, at which the creditors—including the proxy of the proof of *Charles*—voted for the appointment of a trustee and committee of inspection.

It subsequently transpired, however, that on the day previous to this meeting,—viz., on October 14th, 1883, the debtor *Tricks* had committed suicide in a railway carriage, and in November, 1883, *Charles* made an application to the County Court at Bristol for leave to withdraw his proof on the ground of a *bona fide* mistake in the estimation of the value of the security, but this application was refused.

Applications of the same nature made by *Wintle* the petitioning creditor, and one Mrs. *Sautell* a creditor, who were also interested in policies on the life of the debtor, were in like manner refused by the County Court Judge; but in March, 1884, an appeal against this decision on behalf of *Wintle* was allowed, and an appeal by Mrs. *Sautell* was subsequently compromised.

No appeal against the decision was entered by *Charles*, and on November 30th, 1883, he handed over his policy to the trustee in the bankruptcy on payment of 45*l*., the value estimated, and 31*l*. for a premium paid, in whose possession it had since remained.

An action was subsequently commenced by the trustee against the Insurance Company upon the policy in which a summons was taken out to join *Charles* as co-plaintiff, but this action was stayed.

The County Court Judge having, under all the circumstances, refused to accede to an application to rehear the matter for allowing the proof to be withdrawn or amended, *Charles* now appealed.

*E. Cooper Willis, Q.C. (Rubie with him), for Mr. Charles.*

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It is true the proof was used for voting, but no one was damaged by such use. I say (1) that there was a clear mistake in estimating the value, and when there is such a mistake the Court will step in and prevent the trustee from taking advantage of it. Nobody in such a position who was aware that the debtor had died on October 14th, would prove and assess the value at that small sum. Such mistakes have been dealt with in several cases. The question is whether the person proving has come to a concluded election. (*Ex parte King, In re Palethorpe*, L. R. 20 Eq. 273; 44 L. J. Bank. 92; 32 L. T. 505.) In that case no question of mistake was raised at all. Here I say the creditor made a mistake, because on October 15th, he had not a knowledge of the circumstances under which the matter stood. (*Ex parte Wood, In re Wright*, L. R. 10 Ch. Div. 554; 39 L. T. 646.) So also the judgments of the Lords Justices in *Ex parte Bagshawe, In re Ker* (L. R. 13 Ch. Div. 304; 41 L. T. 743), and of your Lordship in the case of *In re King, Ex parte Mesham* (see *ante*, Volume II. p. 119). In this case there was the clearest mistake. Now (2) as to the time which has elapsed. The Court has power at all times to deal with these matters, and will grant relief. (*Ex parte James, In re Condon*, L. R. 9 Ch. App. 609; 43 L. J. Bank. 107; 30 L. T. 773. *Ex parte Simmonds, In re Carnac*, W. N., November 7th, 1885.)

*Winslow, Q.C.*, for the trustee in the bankruptcy was not called upon.

CAVE, J.:

I am of opinion that the County Court Judge was right in Judgment refusing to rehear this matter. In September, 1883, the present appellant filed his proof, and then estimated the value of his security at the sum of 45*l*. The proof was used at the first meeting of the creditors on October 15th, for the purpose of voting for the appointment of a trustee, but the present appellant having subsequently learned that the bankrupt had come to his death on October 14th, made in November, 1883, an application to the

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County Court for leave to withdraw the proof on the ground that he had made a *bonâ fide* mistake in estimating the value of his security. That motion of November 22nd, was refused. Whether it was refused rightly or wrongly is now no matter. It was refused and there was no appeal. The present appellant if he was dissatisfied ought to have appealed from that decision. He did not do so, but actually on November 30th, 1883, handed over the policy to the trustee on payment of the 45*l.* and 31*l.* Most people would think that the matter would be at an end, and so it would but for the result of the proceedings taken by Mr. *Wintle* and Mrs. *Sawtell*. In *Wintle's* case the decision of the County Court Judge was reversed, and the claim of Mrs. *Sawtell* was subsequently compromised. Still nothing was done, and there is no explanation for the delay. The policy was handed over in November, 1883, and no further steps taken until the middle of April, 1885. Even then I doubt whether anything would have been done but for the dispute with the Insurance Company, and the summons taken out to join the appellant as co-plaintiff. Now I quite agree that when a *bonâ fide* mistake has been committed in matters of this kind, the trustee ought not to take a technical advantage of such mistake. But there is one principle of law which is of great importance, and it is this :—that when a matter has been fought and determined it ought not to be lightly called in question. In bankruptcy it has seemed so important that matters should be wound up, that a very short time—twenty-one days—has been named for appeal. Although this time may be extended, yet some ground must always be shown why this should be done. Now in this case no new matter has come to the knowledge of the appellant since November 30th, 1883. He knew all the facts then, and he did then hand over the policy and accept the sum of 76*l.* from the trustee. I cannot see that it would be right to allow him now, after more than a year and a half, to come and reopen the case. The appeal must, therefore, be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors : *Robinson, Preston, & Stow* for the appellant.

Cases relied upon or referred to:—

*Ex parte King, In re Palethorpe*, L. R. 20 Eq. 273; 44 L. J. Bank. 92; 32 L. T. 505.

*Ex parte Wood, In re Wright*, L. R. 10 Ch. Div. 554; 39 L. T. 646.

*Ex parte Bagshawe, In re Ker*, L. R. 13 Ch. Div. 304; 41 L. T. 743.

*In re King, Ex parte Mesham*, see ante, Volume 2, p. 119.

*Ex parte James, In re Condon*, L. R. 9 Ch. App. 609; 43 L. J. Bank. 107; 30 L. T. 773.

*Ex parte Simmonds, In re Carnac*, W. N., November 7th, 1885.

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# IN RE HUTCHINSON, EX PARTE PLOWDEN AND CO.

*Bankruptcy Act, 1883, section 45.*

“Execution against the goods of a debtor”—Charging order on shares—  
1 & 2 Vict. c. 110.

DIVISIONAL  
COURT.

BEFORE  
HUDDLESTON,  
B., and  
CAVE, J.  
December 21st

*Held*: That a charging order upon shares, made under the Statute 1 & 2 Vict. c. 110, s. 14, does not fall within section 45 of the Bankruptcy Act, 1883, and that the words in the said section, “an execution against the goods of a debtor,” which is to be completed by seizure and sale, do not include such an order.

THIS was an appeal on behalf of Messrs. *Plowden & Co.*, against an order of the learned judge of the Newcastle County Court obtained *ex parte*, and restraining further proceedings in respect of a charging order upon certain shares belonging to the debtor.

On July 22nd, 1885, Messrs. *Plowden & Co.*, recovered judgment against the debtor *Hutchinson* for the sum of about £2000.

This judgment was satisfied to the extent of £700, leaving a balance still due of something like £1,300.

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On July 31st, Messrs. *Plowden & Co.* by virtue of the provisions of the Statute 1 & 2 Vict. c. 110, s. 14, obtained a charging order *nisi* upon certain shares standing in the name of the debtor *Hutchinson*, in the company known as Sir William Armstrong & Co., the order being made returnable on August 12th.

On August 11th, however, *Hutchinson* presented his petition in bankruptcy upon which a receiving order was subsequently made, and the official receiver, as interim receiver, on the same day obtained *ex parte* an order restraining Messrs. *Plowden & Co.* from proceeding to make absolute the charging order *nisi* they had obtained.

On August 12th, the order *nisi* was in consequence discharged, but this decision was reversed on appeal, the question whether the order *nisi* should or should not be made absolute being left to depend upon the result of an appeal to a Divisional Court in Bankruptcy against the decision of the County Court Judge.

This appeal now came on for hearing.

*McIntyre* for Messrs. *Plowden & Co.*

As soon as the charging order was made the creditors became secured creditors.

The statute 1 & 2 Vict. c. 110, section 14, provides, "That if any person against whom any judgment shall have been entered up in any of her Majesty's Superior Courts at Westminster shall have any Government stock, funds, or annuities, or any stock or shares of or in any public company in England, (whether incorporated or not,) standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a judge of one of the Superior Courts, on the application of any judgment creditor, to order that such stock, funds, annuities, or shares, or such of them or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor: provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order." And by section 15,

“ In order to prevent any person against whom judgment shall have been obtained from transferring, receiving or disposing of any stock, funds, annuities, or shares hereby authorised to be charged for the benefit of the judgment creditor under an order of a judge, be it further enacted, that every order of a judge charging \* \* \* under this Act, shall be made in the first instance *ex parte*, and without any notice to the judgment debtor, and shall be an order to show cause only; and such order, if any Government stock, funds, or annuities standing in the name of the judgment debtor in his own right or in the name of any person in trust for him, is to be affected by such order, shall restrain the Governor and Company of the Bank of England from permitting a transfer of such stock in the meantime, and until such order shall be made absolute or discharged; and if any stock or shares of or in any public company, standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is or are to be affected by any such order, shall in like manner restrain such public company from permitting a transfer thereof; and that if, after notice of such order to the person or persons to be restrained thereby, or in case of corporations to any authorised agent of such corporation, and before the same order shall be discharged or made absolute, such corporation or person or persons shall permit any such transfer to be made, then and in such case the corporation or person or persons so permitting such transfer shall be liable to the judgment creditor for the value or amount of the property so charged and so transferred, or such part thereof as may be sufficient to satisfy his judgment: and that no disposition of the judgment debtor in the meantime shall be valid or effectual as against the judgment creditor: and further, that unless the judgment debtor shall within a time to be mentioned in such order, show to a judge of one of the said Superior Courts sufficient cause to the contrary, the said order shall, after proof of notice thereof to the judgment debtor, his attorney or agent, be made absolute: provided that any judge shall, upon the application of the judgment debtor, or any person interested, have full power to discharge or vary such order, and to award such costs upon such application as he may think fit.”

The effect of these sections was considered in the case of *Halv v. Barry* (L. R. 8 Ch. App. 452); where a creditor recovered judg-

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ment against his debtor and issued a *fi. fa.* Shortly afterwards the debtor died. The creditor entered a suggestion on the record, entitling him to have execution against the executrix, and obtained a charging order *nisi* upon shares belonging to the debtor. After the order *nisi* had been obtained, but on the same day, a decree was made for administration of the debtor's estate. The order *nisi* not having been made absolute, the plaintiff in the administration suit applied for an injunction to restrain further proceedings by the judgment creditor. It was held "that an injunction ought not to be granted. A charging order, when made absolute, operates from the making of the order *nisi*." Then in *Ex parte Joselyne, In re Watt* (L. R. 8 Ch. Div. 327 ; 47 L. J. Bank. 91 ; 38 L. T. 661), the effect of the judgment was that a creditor who had served a garnishee order *nisi* was secured within the meaning of section 16 of the Bankruptcy Act, 1869. But we have now to consider the effect of section 45 of the Bankruptcy Act, 1883, which provides, (1) "Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor. (2) For the purposes of this Act, an execution against goods is completed by seizure and sale : an attachment of a debt is completed by receipt of the debt : and an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver." The effect of that section is to get rid of the decisions with respect to attachment of debts. It does not apply to a case like the present. A secured creditor is defined to be "a person holding a charge." I submit that the section deals with the attachment of debts, but it does not apply to charging orders.

*Sidney Woolf* for the official receiver.

It would be very strange if this section 45 should be held to apply to every kind of execution except a charging order. It is clear from the judgments in *Haly v. Barry* (L. R. 3 Ch. App. 452) that a



charging order under the statute 1 & 2 Vict. c. 110, is a species of execution. So also in the case of *Finney v. Hinde* (L. R. 4 Q. B. D. 102; 48 L. J. Q. B. 275; 40 L. J. 198), Chief Justice Cockburn said, "The Act 1 & 2 Vict. c. 110 was passed for the abolition of arrest on mesne process, and also to introduce further provisions for facilitating the execution of judgments." A charging order is a proceeding in the nature of an execution. I submit that as an execution it falls within section 45, sub-section (1) of the Bankruptcy Act, 1888. The case of *The Colonial Bank v. Whinney* (see *ante*, Volume II. p. 234) decided that shares are not choses in action but goods. (Counsel also referred to *Leggott v. Western*, 12 Q. B. D. 287; *Ex parte Vale*, *In re Bannister*, L. R. 18 Ch. Div. 137; 50 L. J. Ch. 787; 45 L. T. 200.)

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EX PARTE  
FLOWDEN  
& Co.

*December 21st.*

On this day Mr. Justice CAVE delivered the judgment of the Court as follows:—

The question in this case is whether an order made under the Judgment. 1 & 2 Vict. c. 110, s. 14, is within the 45th section of the Bankruptcy Act.

The facts of the case are simple. On the 31st of last July the appellants, who were judgment creditors of the bankrupt, obtained an order nisi under the 1 & 2 Vict. c. 110, attaching certain shares standing in the name of the bankrupt. On the 11th of August the debtor presented a petition in bankruptcy, and a receiving order was made; and on the same day an order was made restraining the appellants from proceeding to make their order nisi absolute.

The 1 & 2 Vict. c. 110, which is entitled an Act for (amongst other things) extending the remedies of creditors against the property of debtors, provides by section 14 that "if any person against whom any judgment shall be entered up shall have any government stock, funds or annuities, or any stock or shares of or in any public company standing in his name in his own right, it shall be lawful for a judge on the application of any judgment creditor to order that such stock, funds, annuities or shares shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order

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shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor, provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order." By section 15 the order is to be made in the first instance *ex parte*, and without any notice to the judgment debtor, and is to be an order to show cause only. In *Haly v. Barry* (L. R. 3 Ch. App. 452) it was held that the order when made absolute operates from the making of the order *nisi*.

By the 21 Jac. 1, c. 19, s. 9, it was enacted that all and every creditor and creditors having security for his or their several debts by judgment, statute, recognizance, specialty, or other security, of the goods and chattels of any such bankrupt whereof there was no execution or extent served and executed upon any the lands, tenements, hereditaments, goods, chattels, and other estate of such bankrupt before such time as he or she should or did become bankrupt, should not be relieved upon any such judgment, statute, recognizance, specialty, or other security, for any more than a rateable part of their just and due debts with the other creditors of the said bankrupt.

This Act was repealed by the 6 Geo. 4, c. 16, which by section 81 enacted that all executions and attachments against the lands and tenements, or goods and chattels of such bankrupt *bonâ fide* executed or levied more than two calendar months before the issuing of the commission should be valid, notwithstanding any prior act of bankruptcy by him committed, provided the person or persons at whose suit or on whose account such execution or attachment should have issued had not, at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed.

By the 2 & 3 Vict. c. 29, s. 1, it was enacted that all executions and attachments against the lands and tenements, or goods and chattels of any bankrupt *bonâ fide* executed and levied before the date and issuing of the fiat should be deemed to be valid notwithstanding any prior act of bankruptcy by such bankrupt committed, provided the person or persons at whose suit or on whose account such execution or attachment should have issued had not, at the

time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed.

The last two Acts were repealed by the Bankruptcy Act of 1849, which by section 188 enacted that all executions and attachments against the goods and chattels of any bankrupt *bonâ fide* executed and levied by seizure and sale before the date of the fiat or the filing of such petition should be deemed to be valid notwithstanding any prior act of bankruptcy, provided the person at whose suit or on whose account such execution or attachment should have been issued had not, at the time of so executing or levying such execution or attachment, or at the time of making any sale thereunder, notice of any prior act of bankruptcy by him committed. By section 184 it was enacted that no creditor having security for his debt, or having made an attachment in London or in any other place by virtue of any custom there used, of the goods and chattels of the bankrupt, should receive upon any such security more than a rateable part of such debt, except in respect of any execution or attachment served and levied by seizure and sale upon, or any mortgage of or lien upon, any part of the property of such bankrupt before the date of the fiat or the filing of the petition for adjudication.

The Act of 1869, which repealed the Act of 1849, provided by section 95, sub-section (3), that notwithstanding any prior act of bankruptcy, any execution or attachment against the goods of any bankrupt executed in good faith by seizure and sale before the date of the order of adjudication should be valid, if the person on whose account such execution or attachment was issued, had not, at the time of the same being executed by seizure and sale, notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication. Section 184 of the Act of 1849 was not re-enacted.

By section 45 of the Act of 1883 it is enacted that, where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor. For the purposes of the Act an

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execution against goods is completed by seizure and sale; an attachment of a debt is completed by receipt of the debt; and an execution against land is completed by seizure, or in the case of an equitable interest, by the appointment of a receiver.

It is clear that the 1 & 2 Vict. c. 110, gives the creditor who has obtained an order nisi, a charge upon the shares of the debtor; and, although such charge was probably not a lien within the exception contained in section 184 of the Bankruptcy Act, 1849, yet that section has not been re-enacted in the present Bankruptcy Act, section 45 being only a reproduction with some alterations, which do not affect this case, of section 133 of the Act of 1849, which again was a reproduction of section 81 of the 6 Geo. 4, c. 16. In *Ex parte Joselyne*, *In re Watt* (L. R. 8 Ch. Div. 327; 47 L. J. Bank. 91; 33 L. T. 661), it was held that a judgment creditor who before the filing of a liquidation petition by his debtor had obtained a garnishee order nisi attaching debts due to the debtor, was a secured creditor within the Act of 1869; and it was never contended or suggested that such an order was an execution or attachment against the goods of the debtor within section 95 of that Act, probably because, whatever might be the meaning to be attached to the word "goods" in that section, a garnishee order cannot be executed by seizure and sale. It is true that the language of section 45 of the present Act differs from that of section 95 of the Act of 1869, so that a garnishee order is now specifically struck at by section 45, but that is rather a reason why we should hold that an order under the 1 & 2 Vict. c. 110, is not within section 45, seeing that there has been no alteration in the language of the successive Acts relating to executions and attachments of such a character as to apply to orders under the 1 & 2 Vict. c. 110, while section 184 of the Act of 1849, which probably did apply to such orders, has not been re-enacted. In *Ex parte Abbott*, *In re Gourlay* (L. R. 15 Ch. Div. 447; 50 L. J. Ch. 80; 43 L. T. 417), it was held that section 87 of the Act of 1869 had no application to a seizure of goods under an *elegit*, because under an *elegit* there never was any sale by virtue of which any proceeds of sale could come into the sheriff's hands. In that case Lord Justice JAMES says, "If we were to extend the section to the present case, we should be not construing it, but legislating to

supply an omission in it." So here, it may be that an order nisi under the 1 & 2 Vict. c. 110, s. 14, is a *casus omissus*; but if we were to treat the expression "an execution against the goods of a debtor," which is to be completed by seizure and sale as including such an order, we should, I think, be legislating to supply an omission, and not construing the Act. In my judgment the appeal should be allowed with costs.

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*Appeal allowed with Costs.*

Cases relied upon or referred to:—

*Haly v. Barry*, L. R. 3 Ch. App. 452.

*Ex parte Joselyne, In re Watt*, L. R. 8 Ch. Div. 327; 47 L. J. Bank. 91; 38 L. T. 661.

*Finney v. Hinde*, L. R. 4 Q. B. D. 102; 48 L. J. Q. B. 275; 40 L. T. 193.

*Colonial Bank v. Whinney*, see *ante*, Volume II., p. 234.

*Leggott v. Western*, L. R. 12 Q. B. D. 287.

*Ex parte Vale, In re Bannister*, L. R. 18 Ch. Div. 137; 50 L. J. Ch. 787; 45 L. T. 200.

*Ex parte Abbott, In re Gourlay*, L. R. 15 Ch. Div. 447; 50 L. J. Ch. 80; 43 L. T. 417.

IN RE DAVIS, EX PARTE THE TRUSTEES OF  
POLLEN'S ESTATE.

BEFORE  
MR. JUSTICE  
CAVE.  
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*Bankruptcy Act, 1883, section 46, sub-section (2).*

*Execution—Private sale—Goods left on the premises—Right of landlord.*

December 16th  
and 21st.

On March 11th the goods of the debtor were seized under a *fi. fa.*, and on March 17th they were sold by the sheriff by private contract under an order of the Court to that effect, but they were not removed from the premises by the purchaser until April 10th.

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On March 23rd a bankruptcy petition was presented against the debtor, and on April 14th a receiving order was made.

On April 15th the landlords of the debtor's premises served upon the sheriff a notice requiring him not to remove the goods from such premises until the sum of 116*l.* 8*s.*, arrears of rent due at Christmas, 1884, and Lady-day, 1885, had been paid to them.

The sheriff under section 46, sub-section (2) of the Bankruptcy Act, 1883, handed to the trustee of the bankrupt's estate the proceeds of the sale after deducting the usual costs of execution.

On an application for an order directing the sheriff to pay to the landlords the said sum of 116*l.* 8*s.*:

*Held*: That for the rent due at Christmas, 1884, the landlords might have distrained at any time between March 17th and April 10th; and for the rent due on March 25th, the sheriff who quitted the premises on March 17th was not responsible; and that, the landlords having failed to take advantage of the opportunity offered to them, the application must be dismissed with costs.

THIS was an application on behalf of the trustees of the estate of the late Rev. *George Pollen*, for an order that the trustee in the bankruptcy of *Benn Davis* should pay out of the proceeds of the sale of the bankrupt's effects at his office, 6 Cork Street, Burlington Gardens, the sum of 116*l.* 8*s.*, being the rent and insurance premiums which became due to the applicants in respect of such premises, at Christmas, 1884, and Lady Day, 1885.

By an indenture of lease bearing date May 9th, 1878, the trustees of *Pollen's Estate* demised the premises in Cork Street to one *E. F. Davis*, for the term of twenty-one years, at the annual rent of 225*l.* and such sum as the lessors should expend in insurance, the rent being payable quarterly, and the insurance at Lady Day in each year.

This lease subsequently vested in the bankrupt *Benn Davis*.

At Christmas, 1884, a quarter's rent, amounting to 56*l.* 5*s.*, became due and was not paid.

On March 11th, 1885, the Sheriff of Middlesex seized the effects of the debtor in Cork Street under a *fi. fa.*, at the suit of *Brittans, Levett, & Co.*, for 312*l.*, and on March 17th the sheriff sold the same under an order of the Court by private sale, and received the proceeds on the same day.

On March 23rd, 1885, a bankruptcy petition was presented against the debtor *Benn Davis*, notice of which was duly on the same day given to the sheriff.

On March 25th, 1885 (Lady Day), a second quarter's rent, amounting to 56*l.* 5*s.*, together with 3*l.* 18*s.* for insurance, became due, making the total amount due to the landlords 116*l.* 8*s.*

On April 10th, 1885, the goods of the debtor which had been sold by the sheriff were removed by the purchaser.

On April 14th a receiving order was made, and on the following day—April 15th—notice was served by the solicitors for the applicants upon the sheriff to the effect that the sum of 116*l.* 8*s.* was due to the landlords for rent, and requiring him not to remove any goods from the premises, or to suffer them to be removed, until the arrears of rent were paid.

On May 3rd, 1885, a Mr. *Nichols* was appointed trustee of the debtor's estate, and on May 5th the debtor was adjudicated a bankrupt.

The sheriff, pursuant to section 46, sub-section (2) of the Bankruptcy Act, 1883, paid over to the trustee in the bankruptcy the proceeds of the sale after deducting the costs of execution, and the applicants subsequently claimed from the sheriff payment of the rent.

It was agreed between the sheriff and the trustee in the bankruptcy, that in the event of the sheriff being held to be bound to pay the rent, such trustee was now liable.

*Kisch* in support of the application.

If the goods had not been seized, the landlords would have been entitled to their distress, notwithstanding the bankruptcy. In the case of *Arnitt v. Garnett* (9 B. & A. 440), it was held that, "under the statute of 8 Anne, c. 14, the sheriff is bound to retain one year's rent out of the proceeds of a tenant's goods taken in execution provided he has notice of the landlord's claim at any time while the goods or the proceeds remain in his hands; and the Court upon motion ordered the same to be paid to the landlord, even where the notice was given after the removal of the goods from the premises." Here the removal was by the purchaser. So by *Wharton v. Naylor* (12 Q. B. 673), "the statute 8 Anne, c. 14, makes it unlawful to remove goods taken in execution without paying one year's arrears of rent to the landlord; but it does not invalidate the execution itself. Goods, therefore, so taken, are in

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*custodiâ legis*, and cannot be distrained on by the landlord for the year's rent; and they are equally in *custodiâ legis*, for this purpose, whether they are in the hands of the sheriff or of his vendee." (Counsel also referred to the case of *Bible v. Hussey*, 16 W. R. 710.) And by *Andrews v. Dixon* (8 B. & A. 645), "where a sheriff with knowledge that there is rent due to the landlord, proceeds to sell the tenant's goods by virtue of a *fi. fa.*, without retaining a year's rent, he will be liable for it, although no specific notice has been given to him by the landlord."

*Sidney Woolf* for the trustee in the bankruptcy.

It was decided by the case of *Gethin v. Wilks* (2 Dowl. 189), that "in order to enforce a landlord's claim for rent in arrears against assignees after a seizure under a *fi. fa.*, he must distrain." The case of *Wharton v. Naylor* (12 Q. B. 673), only goes to shew that goods in the hands of a vendee from the sheriff are still in *custodiâ legis*. The present transaction is governed by section 46 of the Bankruptcy Act, 1883. (*In re Pearce, Ex parte Crosthwaite*, see *ante*, Volume II., p. 105; L. R. 14 Q. B. D. 966. Counsel also referred to the case of *Yates v. Ratledge*, 5 H. & N. 249.) Further, in the case of *Hoskins v. Knight* (1 M. & S. 245), it was held that "the landlord of premises upon which the goods of his tenant are taken in execution, can only claim from the party suing the execution, the rent due at the time of taking the goods, and not that which accrues after the taking and during the continuance of the sheriff in possession." And by *Reynolds v. Barford* (7 M. & G. 449), "under the 8 Anne, c. 14, s. 1, the landlord is entitled as against the execution creditor only to rent due at the time of the seizure."

CAVE, J. :

Judgment. In this case I am of opinion that the application must be refused.

As to the quarter's rent due at Lady Day, and the insurance, that amount did not become due until March 25th, whereas the sheriff had seized the goods under the *fi. fa.* on the 11th of March, and sold on the 17th. Now it is established by the cases of *Hoskins v.*



*Knight* (1 M. & S. 245), and *Reynolds v. Barford* (7 M. & G. 449), that the landlord can only claim from the party issuing the execution, the rent due at the time of taking the goods, and not that which accrues afterwards. In this case the sheriff appears to have quitted the premises on the 17th of March, and there was nothing to prevent the landlord from distraining for the rent which became due on the 25th.

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As to the quarter's rent due on the 25th of December other considerations apply. The statute 8 Anne, c. 14, only applies in the case of a removal by the sheriff, or of a removal by the vendee under a delivery by the sheriff. Goods seized under a *fi. fa.* are only protected from distress while they are *in custodiâ legis*; and if the sheriff relinquishes possession, the possession of the goods reverts back to the original owner, and they may be distrained (*Blades v. Arundale*, 1 M. & S. 711). If the sheriff sells under the execution the purchaser should remove the goods at once. In *Peacock v. Purvis* (2 Brod. & B. 362), in which it was held (prior to the passing of the 14 & 15 Vict. c. 25), that growing corn purchased at a sale under a *fi. fa.* could not be distrained by the landlord before it was ripe, for rent due subsequently to the sale, Chief Justice DALLAS says, "With respect to goods it is true that the sheriff, or the person purchasing under him, is bound to remove them within a reasonable time; but it is to the delivery the law looks, and that must be made within a reasonable time." \* \* \* "Not only," he says afterwards, "things actually in the hands of the sheriff are *in custodiâ legis*, but virtually all things taken in execution remain in such custody till the sheriff can deliver them so as to give effect to the judgment." In *White v. Binstead* (13 C. B. 304), Chief Justice JERVIS says, "If the sheriff removes the goods in prejudice of the landlord's claim, then he ought to pay the rent. If the goods are not removed the landlord is not injured." In *Wharton v. Naylor* (12 Q. B. 678), the goods distrained upon were crops which had been sold under a *fi. fa.* and were not at the time of the distress in such a state as to be capable of removal. The marginal note, which lays it down that goods are equally *in custodiâ legis* for the purpose of freedom from distress, whether they are in the hands of the sheriff, or of his vendee, must be read with reference to this fact. In the present case the goods were

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sold by the sheriff on the 17th of March, and paid for on the same day. They were not removed by the purchaser until the 10th of April, and no facts are stated from which I can infer that the sheriff remained in possession until then, or that a reasonable time for removal did not elapse before the 10th of April. I do not understand why the goods were not removed when they were sold and the purchase-money paid, and if the vendee for his own convenience chose to let them remain on the premises after the sale by the sheriff, they are as much liable to distress as if, for his own purposes, he had brought them on to the premises after the 17th of March. I can see nothing to prevent the landlord from distraining for the rent between the 17th of March and the 10th of April; and if he could have distrained during that period he did not lose his right to distrain through any removal by the sheriff or through any delivery by the sheriff. *Vigilantibus non dormientibus jura subveniunt.*

The application must be refused with costs.

*Application refused with costs.*

Solicitors: *Cobb, Pearson, & Co.*, for the trustees of Pollen's Estate.

*Merton* for the trustee in bankruptcy.

Cases relied upon or referred to:—

*Arnitt v. Garnett*, 3 B. & A. 440.

*Wharton v. Naylor*, 12 Q. B. 673.

*Bible v. Hussey*, 16 W. R. 710.

*Andrews v. Dixon*, 3 B. & A. 545.

*Gethin v. Wilks*, 2 Dowl. 189.

*In re Pearce, Ex parte Crosthwaite*, see ante, Volume II. p. 105; L. R. 14 Q. B. D. 966.

*Yates v. Ratledge*, 5 H. & N. 249.

*Hoskins v. Knight*, 1 M. & S. 245.

*Reynolds v. Barford*, 7 M. & G. 449.

*Blades v. Arundale*, 1 M. & S. 711.

*Peacock v. Purvis*, 2 Brod. & B. 362.

*White v. Binstead*, 13 C. B. 304.

## PRACTICE.

IN RE BARNE, EX PARTE BARNE.

*Bankruptcy Act, 1883, section 6, sub-section 1 (d), and section 95.**Domicil of debtor:—Onus of proof—Jurisdiction.*

*Held:* That although the onus is on the petitioning creditor to prove the English domicil of the debtor as required by section 6, sub-section 1 (d), of the Bankruptcy Act, 1883, and that the residence of the debtor has been such as to give the Court in which the petition is presented jurisdiction under section 95; nevertheless, if there is no reason to suppose that the debtor will dispute that his domicil is English, or that the petition is presented in the right Court, it is not necessary for the petitioning creditor in the first instance to adduce evidence of either of these facts.

COURT OF  
APPEAL.  
BEFORE THE  
MASTER OF  
THE ROLLS,  
LINDLEY, L.J.  
LOPES, L.J.  
1886.  
January 22nd.

THIS was an appeal from a decision of Mr. Registrar Giffard, making a receiving order against the debtor *Barne*.

The case raised the question as to the *onus probandi* of the English domicil of a debtor against whom a bankruptcy petition is presented.

Section 6, sub-section (1) of the Bankruptcy Act, 1883, provides that "A creditor shall not be entitled to present a bankruptcy petition against a debtor unless:— \* \* \* (d). The debtor is domiciled in England, or, within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in England."

And by section 95, sub-section (1). "If a debtor against or by whom a bankruptcy petition is presented has resided or carried on business within the London Bankruptcy district as defined by this Act for the greater part of the six months immediately preceding the presentation of the petition, or for a longer period during those six months than in the district of any County Court, or is not resident in England, or if the petitioning creditor is unable to ascertain the residence of the debtor, the petition shall be presented to the High Court."

The petition was presented against the debtor *Barne* in the Queen's Bench Division, and described him as "late of Gort House,

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Petersham, in the County of Surrey, and of the Junior United Service Club, Charles Street, St. James, in the County of Middlesex, retired officer in her Majesty's Army, and lately carrying on business as a flint-glass manufacturer at William Street, Lambeth, in the County of Surrey, and at 97, Cannon Street, in the City of London." The petitioning creditor further alleged that the debtor had for the greater part of six months next preceding the presentation of the petition carried on business at William Street and Cannon Street.

At the hearing it was objected, amongst other things, on behalf of the debtor, that he had not for the greater part of the six months next preceding the presentation of the petition carried on business as therein alleged, but the notice of objection did not in any way suggest that the debtor had not an English domicile.

A receiving order was made by the learned registrar, and from this order the debtor *Barne* now appealed.

*Melville* for the debtor.

The petitioning creditor did not prove that the debtor had carried on business as alleged.

Then by section 6, sub-section 1 (d), the *onus* of proving that a debtor is domiciled in England lies on the creditor. The creditor here did not adduce any evidence of the debtor's domicile. In the case of *In re Mitchell, Ex parte Cunningham* (see *ante*, Volume I. p. 197; L. R. 13 Q. B. D. 418); it was held "That the onus of proof of the domicile is, in the first instance, on the creditor presenting the petition." [*Counsel here read an affidavit of the debtor in support of the appeal.*]

[THE MASTER OF THE ROLLS. That affidavit itself shows that the debtor was a born Englishman, and at the time of the petition was not residing in England. That removes both difficulties.]

*E. Cooper Willis*, Q.C. (*F. C. Willis* with him), for the petitioning creditor, were not called upon.

THE MASTER OF THE ROLLS (LORD ESHER):

Judgment.

I entirely agree with the decision of the registrar in this case.

I agree with and feel bound by the judgments in *In re Mitchell, Ex parte Cunningham*, that the burden of proving the jurisdiction of the Court with reference both to section 6 and section 95 lies on the petitioning creditor. The phraseology used by Lord Justice BAGGALLAY in that case must be taken in connection with the facts of the particular case. There it was assumed and admitted by everyone that the debtor's domicile of birth was in Ireland, and if the burden of proving an English domicile of the debtor lies originally on the petitioning creditor, it lies on him all the more heavily if the debtor's domicile of origin is in Ireland. The question is how much *primâ facie* evidence is necessary on the part of the petitioning creditor in order to shift the burden of proof. It is contrary to all practice that a petitioning creditor should go into Court with evidence to prove the English domicile of the debtor if it has been assumed throughout that he is domiciled in England. If it has been assumed throughout and not denied, that is sufficient. Here certainly the petitioning creditor has done all that was absolutely necessary. The debtor himself has in fact proved what was necessary. He has put in an affidavit the only inference from which must be that he was a born Englishman, and that he was, when the petition was presented, resident in Brussels. In it he says that he is an Englishman, and that fixes his family unless he can show he has changed his domicile. He does not pretend that he has changed his domicile of origin. Then as to the requirements of section 95, the affidavit says that the debtor is of a particular avenue, in a particular street in Brussels. That means that he is residing abroad. The appeal must be dismissed with costs.

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LINDLEY, L. J. :

The debtor's affidavit disposes of all the difficulties in this case. It removes the difficulty on section 95, as to where the petition ought to be presented, because it shows that the debtor was resident in Brussels. Then as to section 6, sub-section 1 (d). The language of the section throws the burden of proof on the petitioning creditor if there is any dispute. But there is no dispute in nine cases out of ten, and the petitioning creditor cannot be expected to go into Court with evidence of the debtor's English domicile when there is no reason to suppose that it will be disputed. After the

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affidavit put forward by the debtor in this case, no other evidence can be required. He says that he is an Englishman; he has an English name; he is a retired officer in the English Army; and he swears the affidavit before the English Consul.

LOPES, L. J. :

The petitioning creditor must give *prima facie* evidence to show the jurisdiction of the Court. But here the affidavit of the debtor removes all the objections which have been taken. It shows that he is an Englishman, and at present resides out of England. That removes the objections both under section 6, sub-section 1 (d), and section 95. The appeal must therefore be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors : *Jackson & Co.* for the debtor.

*Tamplin, Taylor & Joseph* for the petitioning creditor.

Case relied upon :—

*In re Mitchell, Ex parte Cunningham*, see *ante*, Vol. I. p. 137,  
 L. R. 13 Q. B. D. 418.



COURT OF  
 APPEAL

BEFORE THE  
 MASTER OF  
 THE ROLLS,  
 LINDLEY, L.J.,  
 LOPES, L.J.

1886.

*January 22nd.*

IN RE TOWNSEND, EX PARTE PARSONS.

*Bill of sale*—"Licence to take possession of personal chattels as security for any debt"—*Bills of Sale Act*, 1878 (41 & 42 Vict. c. 31), sections 3 and 4 : *Bills of Sale Act*, 1882 (45 & 46 Vict. c. 43), sections 3 and 9.

*Held*: That although it is from its nature impossible that a licence to take immediate possession of goods as a security for a debt, which is a bill of sale within the Bills of Sale Acts, 1878 and 1882, should be made in the form given in the schedule to the Act of 1882, such a licence is void under section 9 of that Act as between grantor and grantee, the object of the Act

being to make void every bill of sale given to secure the payment of money by the grantor unless it is made substantially in accordance with the form given in the schedule.

The *ratio decidendi* in the cases of *In re Hall, ex parte Close* (L. R. 14 Q. B. D. 386), and *In re Cunningham & Co., Attenborough's Case* (L. R. 28 Ch. D. 682), disapproved.

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IN RE  
TOWNSEND,  
EX PARTE  
PARSONS.

THIS was an appeal on behalf of one *J. Parsons* from an order of the Divisional Court sitting in bankruptcy.

The case raised an important question whether a document which authorises immediate possession to be taken of goods as security for a debt is a bill of sale within the Bills of Sale Act, 1878, and therefore made void by section 9 of the Bills of Sale Act, 1882, because it is not made in the form given in the Schedule to that Act.

In August 1884, the debtor, *Townsend*, was the owner of certain furniture and effects at 26, Eaton Place, Brighton, and execution having been issued against him under a judgment for 50*l.*, he applied to *Parsons*, a house-agent and grocer, to whom he owed 30*l.* for grocery, for assistance to pay out the sheriff.

*Parsons* thereupon advanced to *Townsend* 50*l.* in cash for that purpose, and a further sum in cash, and, as security for the money so advanced to him, *Townsend* signed on August 7th, 1884, the following document addressed to *Parsons* :—

“To *J. Parsons*, estate-agent. I hereby authorise and empower you to take immediate possession of all my goods, chattels, plate, and other effects, at No. 26, Eaton Place, Kemp Town, Brighton, and to sell the same, either by public auction or private contract, as soon as convenient may be, and out of the proceeds thereof I authorise you to deduct any moneys due from me to you, and any accounts due from me to the tradespeople in and about Kemp Town, and after deducting all proper charges for the sale of my effects and money advanced by you, to pay over to me the balance thereof.  
T. E. TOWNSEND.”

After the execution of the above document, *Parsons*, at the request of *Townsend*, consented not to take immediate possession of the goods, and the debtor remained in possession of them until September 6th.

In the interval *Parsons* made further advances, and a document

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dated August 23rd, 1884, was drawn up in similar terms to those contained in that above set out, and with reference to an advance to be made by *Parsons* in connection with the purchase by the debtor of the Sussex Hotel, Brighton, and to other advances to the debtor.

On September 6th *Parsons* took possession of the goods, and a few days afterwards they were, by his direction, put up for sale by auction. Part of the goods were then sold, and the rest remained in *Parsons*' possession until December 9th, when he sold them.

On March 12th, 1885, *Townsend* was adjudicated a bankrupt on a creditor's petition dated December 8th, 1884.

The trustee in the bankruptcy thereupon claimed the goods which were in the possession of *Parsons*, or their proceeds, on the ground that the document of August 7th was a bill of sale within the Bills of Sale Act, 1882, and void.

The learned Judge of the Brighton County Court decided against the trustee, but on an appeal to the Divisional Court in Bankruptcy (CAVE, J. and DAY, J.), the decision of the County Court Judge was reversed.

*Parsons* now appealed from the order of the Divisional Court.

Section 3 of the Bills of Sale Act, 1878, provides:—"This Act shall apply to every bill of sale executed on or after the first day of January, one thousand eight hundred and seventy-nine (whether the same be absolute, or subject or not subject to any trust), whereby the holder or grantee has power, either with or without notice, and either immediately or at any future time, to seize or take possession of any personal chattels comprised in or made subject to such bill of sale."

Section 4 provides that, "The expression 'bill of sale' shall include \* \* \* authorities, or licences to take possession of personal chattels as security for any debt." But it provides that the expression shall not include certain specified documents, such as marriage settlements, bills of lading, warrants or orders for the delivery of goods, "or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented."



Section 3 of the Bills of Sale Amendment Act, 1882, provides that the Act of 1882 shall, so far as consistent with the tenor thereof, be construed as one with the Act of 1878, and that "the expression 'bill of sale,' and other expressions in this Act have the same meaning as in the principal Act, except as to bills of sale or other documents mentioned in section 4 of the principal Act, which may be given otherwise than by way of security for the payment of money, to which last mentioned bills of sale and other documents this Act shall not apply."

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Section 9 of the Act of 1882 provides that, "A bill of sale, made or given by way of security for the payment of money by the grantor thereof, shall be void, unless made in accordance with the form in the schedule to this Act annexed."

The form of bill given in the schedule, with which bills must be in accordance, is a mortgage form, and provides that the chattels assigned by the bill of sale shall not be liable to be seized except for the causes specified in section 7 of the Act, none of which contemplate the taking of immediate possession.

*E. Cooper Willis*, Q.C. (*Gore* with him), for the appellant *Parsons*.

The document is not a bill of sale. It is a valid document, and the present appellant is entitled to the goods. Where the effect of a document is to give the grantee a right to immediate possession the Bills of Sale Acts do not apply. (*In re Hall, Ex parte Close*, L. R. 14 Q. B. D. 886; 54 L. J. Q. B. 43; 51 L. T. 795; *In re Cunningham & Co., Attenborough's Case*, L. R. 28 Ch. Div. 682; 52 L. T. 214.) It would be impossible to make a document in accordance with the form in the schedule which would have the effect intended to be given to a document like this. The Act cannot apply to such documents.

*Philbrick*, Q.C. (*Parsons* with him), were not called upon.

THE MASTER OF THE ROLLS (LORD ESHER):

Whatever may have been the verbal agreement between *Townsend* and *Parsons*, the terms of it were reduced into writing by the Judgment.

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document of August 7th. We cannot, therefore, look at anything but the writing. Now, when we look at the written document it is obvious that the agreement was not one of purchase and sale, but one of loan, and of loan on security. *Parsons* was to lend money to *Townsend*, and as security he was to have certain rights over *Townsend's* furniture. He was to have the right to take immediate possession of the goods, and to sell them; and after repaying himself the money he had lent and some other debts of *Townsend*, he was to account to *Townsend* for the surplus. By the agreement the intention clearly was that *Parsons* should have the right to take immediate possession of the goods. But an application was on the same day made to him by *Townsend* to hold his hand and not to exercise the right given to him. *Townsend* asked *Parsons* for an indulgence because at that time the exercising of the right would be injurious to him, and that indulgence was granted. *Parsons* did agree not to put his rights into force at once. But no consideration was given for this new promise. It was not binding. At a subsequent period *Parsons* took possession of the goods. He put a man in possession, and *Townsend* acquiesced in such taking possession. This was done in exercise of the right supposed to have been given by the original agreement. *Parsons* instructed an auctioneer to sell the goods for him, and they were accordingly put up for sale under certain conditions. Some were sold and taken away by the purchasers. *Townsend* and certain of his friends bid for others, and they were knocked down to them as purchasers. They were entitled to have the goods if they paid for them according to the conditions of sale; if not *Parsons* was entitled to resume possession of the goods. The goods were not paid for, and they remained in the possession of *Parsons* as the supposed vendor. Since then *Townsend* has become a bankrupt, and the trustee in the bankruptcy now alleges that *Parsons* is not entitled to retain the goods which were *in specie* at the time of the bankruptcy, although he had taken possession of them before the bankruptcy. It was contended that even if the document of August 7th was not a bill of sale under the Bills of Sale Acts, because the right to take immediate possession of the goods was given by it, yet as possession was not taken till some time afterwards, the omission to take immediate possession converted the document into a bill of sale. I do not

think it is necessary to determine this point, but I am certainly inclined to think that a document which was not originally a bill of sale, could not be converted into a bill of sale by that which took place subsequent to its execution. At Common Law the document in question is not a bill of sale. The question is whether any statute has made it a bill of sale. Section 4 of the Bills of Sale Act, 1878, provides that the expression "bill of sale" shall include " \* \* \* licences to take possession of personal chattels as security for any debt," and it seems to me that the document is a bill of sale within that Act. But the question of its validity depends, of course, on the Bills of Sale Act of 1882. Section 3 of that Act provides that the Act of 1878 and that of 1882 are to be construed as one, and the expression "bill of sale" is to have the same meaning in the Act of 1882 as in that of 1878, except as to bills of sale given otherwise than by way of security for the payment of money. The document, therefore, is a bill of sale within the Act of 1882, because it is a bill of sale within the Act of 1878. The question is whether it is made void by the Act of 1882. Section 9 of that Act provides that "A bill of sale made or given by way of security, for the payment of money by the grantor thereof, shall be void unless made in accordance with the form in the schedule to this Act annexed." Now those words are very general. This document is not in accordance with the form in the schedule, and if it is within the Act it is void. But a difficulty arises from the fact that two learned Judges for whose opinion we have the greatest respect, have in effect said that when there is such an ordinary transaction as the advance of money upon the security of goods, the arrangement being that possession is to be given immediately, the transaction cannot be put into the form given in the schedule, and that the Legislature could not have intended to deal with such a transaction. In effect they have said that the true construction of the Act must be that section 9 does not apply to a document by which the right to immediate possession of goods is given. Now can this Court allow that reasoning? Section 9 is very general in its terms, and there is no exception of a document which gives a right to the immediate possession of goods. In the present case the document of August 7th is the only agreement which gives the appellant a right to the possession of the goods. Can it be a true

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inference that the Legislature did not intend to strike at such a transaction as this? It is well known that before the Act of 1882 was passed, certain money lenders were in the habit of using forms as a means of puzzling ignorant borrowers, and that even practised solicitors frequently found considerable difficulty in advising a borrower as to the meaning of the words used. It was against written documents that the Legislature meant to act. It seems to me, that the words strike at all documents which give a security upon goods for the payment of money. The intention, in my opinion, was that if an agreement cannot be made by a document in the form specified in the schedule, it shall not be made by any document at all. I cannot, therefore, agree with the *ratio decidendi* in the cases of *In re Hall*, *Ex parte Close* (L. R. 14 Q. B. D. 386; 54 L. J. Q. B. 48; 51 L. T. 795), and *In re Cunningham & Co., Attenborough's Case* (L. R. 28 Ch. Div. 682) which have been cited, though the former case was rightly decided, because the document there was one of those excepted by the proviso at the end of section 4 of the Act of 1878. The Legislature is doubtless very harsh with lenders of money on the security of goods, but it was necessary to protect some borrowers from the practices of unscrupulous money lenders, and the Act applies to all lenders. The document, therefore, cannot be relied upon, and *Parsons* was not authorised to take possession of the goods. The appeal must, therefore, be dismissed.

LINDLEY, L. J.:

I am of the same opinion. I feel bound to say that the document of August 7th is a bill of sale within the Act of 1878. I think the case is a hard one against the lender of the money, but the document was given as security for the payment of money, and we must apply the Act of 1882 to it. If that is done, it seems clear that the instrument is made void by section 9. The Act is a very stringent one, and it was aimed at unscrupulous money lenders. It applies, however, to all lenders. Now, if the Act of 1882 makes the instrument void, it follows that the parties cannot ratify or confirm a void Act. The only thing which could help the grantee would be a new transaction giving him the right to the possession of the goods. I cannot find anything of that kind in the present case. I

am of opinion that the reasoning of the Judges in the two cases which have been cited was erroneous. The appeal must, therefore, be dismissed.

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LOPES, L. J. :

I do not hesitate to say that in my opinion the Legislature intended by the Act of 1882 to provide that all documents giving security upon goods for the payment of money shall be in the form specified in the schedule, and that if they are not in that form they shall be void. I have had considerable experience of the iniquities perpetrated by means of bills of sale, and I say at once that in my opinion the Act is a good and salutary one.

*Appeal dismissed with costs.*

Solicitors : *Nash & Field* for Mr. *Parsons*.

*Plunkett & Leader* for the trustee.

Cases relied upon referred to :—

*In re Hall, Ex parte Close*, L. R. 14 Q. B. D. 386 ; 54 L. J. Q. B. 43 ; 51 L. T. 795.

*In re Cunningham & Co. ; Attenborough's Case*, L. R. 28 Ch. Div. 682 ; 52 L. T. 214.

## PRACTICE.

IN RE GOOD.

*Bankruptcy Act, 1883, section 28.*

*Discharge—Delay in applying for.*

BEFORE  
MR.  
REGISTRAR  
BROUGHAM.  
1886.

*Held* : That the fact that a bankrupt who, by his conduct, has brought himself within the quasi-penal provisions of section 28 of the Bankruptcy Act, 1883, abstains from applying for his discharge for a considerable time

*January 22nd.*

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after he is entitled to do so, affords no ground for mitigation of the punishment proper to be imposed by the Court under that section by reason of such conduct.

**T**HIS was an application for an order of discharge. The debtor, *Henry Ralph Good*, was a wine and spirit merchant carrying on business in the City of London, in partnership with his brother, *Edward Good*, under the title of *Henry Good & Sons*.

The receiving order was made on a creditor's petition on November 6th, 1884, the liabilities being returned at 1963*l.* 14*s.*, and the assets *nil*.

*Edward Good* applied for his discharge in February, 1885, when the discharge, in his case, was suspended for a period of nine months.

The present application was for the discharge of the bankrupt, *Henry Ralph Good*.

Mr. *Tanner* read the report from the Official Receiver, from which, *inter alia*, it appeared :—

“That the bankrupts in August, 1881, assigned by bill of sale to one *Arthur Octavius Bayley*, and as security for a cash advance, all their stock, goodwill, plant, book-debts, and all their then effects, together with all their future-acquired property.

“That the said *Arthur Octavius Bayley*, prior to the date of the receiving order, seized and disposed of the whole of the estate of the bankrupts, and in consequence no dividend has been paid.”

And the Official Receiver further submitted :—

“That, inasmuch as by the terms of the above-mentioned assignment not only the whole of the then property of the bankrupts passed to and became the property of the said *Arthur Octavius Bayley*, but the whole of their after-acquired property, including any stock that might at any time thereafter be on their business premises, and the proceeds of sale thereof (from which they might in the event of their not having given the above-mentioned bill of sale, reasonably have expected to be able to pay their present debts), also passed to and became the property of the said *A. O. Bayley* until payment off of his charge, amounting to 2536*l.*, the whole of the

debts contracted by the bankrupts subsequently to the date of the said assignment were so contracted without reasonable or probable ground of expectation on their part of being able to pay them."

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[BROUGHAM, REGISTRAR. How does this case differ from that of the brother, *Edward Good*, in which I suspended the discharge for nine months?]

*C. F. Morrell* for the bankrupt, *H. R. Good*.

It is impossible to argue, after the decision of the Court of Appeal in the case of *In re White, Winter & Co., Ex parte White, Winter & Co.* (see *ante*, Volume II., p. 42, L. R. 14 Q. B. D. 600), that the bankrupt is entitled to an absolute discharge. In that case a precisely similar assignment had been given to the same *A. O. Bayley*. The only distinction is, that there the bankrupts were commencing business, while in this case there was an old established business and connection, which it was wished to keep up. The facts to which I wish to call your Honour's attention are these. The bankrupt passed his public examination on April 24th, 1885. He has, on his own responsibility, voluntarily declined to ask for his discharge until now. He has, in fact, voluntarily imposed upon himself the punishment awarded to his brother. During that time he has been unable to do any business, and has been living with his friends, separated from his wife, who is ill. The bankrupt himself is in very bad health, and has been attended by several doctors,

BROUGHAM, REGISTRAR :

I see no reason why the bankrupt in this case should be treated Judgment. in a different manner to that of his brother, with whom he was in partnership. The same circumstances apply to each case, and the discharge of the brother was suspended for nine months. It must be understood that the fact that a bankrupt omits on his own responsibility to ask for his discharge for a considerable period after he might do so, affords no ground why the Court should not mark its sense of the conduct of such bankrupt in the manner provided by the Act. When a bankrupt's conduct has been contrary to the provisions of the Act, the Court has its duty to perform.

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Under some very special circumstances it might perhaps happen that the Court, with the consent of the official receiver, might order a suspension to date back as commencing at some prior particular date. But here the bankrupt passed his public examination on April 24th, 1885, and the result in this case would be that no punishment would be imposed at all. The discharge of the bankrupt must be suspended for nine months from the date of the present application.

*Order accordingly.*

Solicitors: *W. W. Aldridge* for the official receiver.

*Collyer-Bristow, Withers, Russell, & Hill*, for the bankrupt.

Case referred to:—

*In re White, Winter & Co., Ex parte White, Winter & Co.*  
 see *ante*, Volume II., p. 42, L. R. 14 Q. B. D. 600.

## PRACTICE.

BEFORE  
 MR. JUSTICE  
 CAVE.  
 1886.

IN RE NICHOLSON, EX PARTE NICHOLSON.

*Bankruptcy Act, 1883, Section 112.*

*February 15th. Bankruptcy of Partners—Application to transfer proceedings from County Court to High Court.*

On February 4th, 1886, a receiving order was made against one partner in the High Court; and on February 6th, 1886, the other partner presented a petition in a County Court.

On an application by the partner against whom a receiving order had been made in the High Court for an order to transfer the proceedings in the County Court against the other partner to the High Court.

*Held:* (1) That the application for transfer ought to be made to the County Court.



(2) That in any event the application was one which ought to have been made to the registrar and not to the Judge in Court.

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NICHOLSON,  
EX PARTE  
NICHOLSON.

THIS was an application on behalf of the debtor *Nicholson*, that certain bankruptcy proceedings in the Swansea County Court might be transferred to the High Court under section 112 of the Bankruptcy Act, 1883.

Section 112 provides that "Where a receiving order has been made on a bankruptcy petition against or by one member of a partnership, any other bankruptcy petition against or by a member of the same partnership shall be filed in or transferred to the Court in which the first-mentioned petition is in course of prosecution, and, unless the Court otherwise directs, the same trustee or receiver shall be appointed as may have been appointed in respect of the property of the first-mentioned member of the partnership, and the Court may give such directions for consolidating the proceedings under the petitions as it thinks just."

The debtor *Nicholson* carried on business in partnership with one *Pearce*, at Swansea, and also at St. Mary Axe.

On February 4th, 1886, a receiving order was made against *Nicholson*, upon his own petition in the High Court.

On February 6th, *Pearce* presented a petition in the County Court at Swansea.

Application was now made by *Nicholson* for an order to transfer the bankruptcy proceedings against *Pearce* to the High Court, and to consolidate them with the proceedings against himself.

*Sidney Woolf* for the debtor *Nicholson*.

*Herbert Reed* for Mr. *Pearce*.

*Sidney Woolf*:

I wish to transfer the bankruptcy proceedings against *Pearce* to this Court, and to consolidate them with the proceedings against *Nicholson*.

[CAVE, J.—What authority has this Court to do so?]

I submit that section 112 of the Bankruptcy Act, 1883, gives authority.

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[CAVE, J.—That section only says any other bankruptcy petition “shall be filed in or transferred to the Court.”]

Section 97 also provides that “(1) Subject to the provisions of this Act, every Court having original jurisdiction in bankruptcy shall have jurisdiction throughout England. (2) Any proceedings in bankruptcy may at any time, and at any stage thereof, and either with or without application from any of the parties thereto, be transferred by any prescribed authority and in the prescribed manner from one Court to another Court, or may by the like authority be retained in the Court in which the proceedings were commenced, although it may not be the Court in which the proceedings ought to have been commenced.” Under that section the case of *In re Walker, Ex parte Soanes* (see *ante*, Volume I. p. 198; L. R. 18 Q. B. D. 484) was decided, and a transfer ordered.

[CAVE, J.—That was by way of appeal. Section 97 hardly applies to the present case.]

I do not rely on section 97 so much as on section 112. I presume your Lordship is of opinion we ought to go to the County Court to get the transfer. Section 112 does not point out which Court we ought to go to.

CAVE, J :

Judgment.

I am of opinion that application ought to be made to the County Court. I have no power to make any order in the bankruptcy of *Pearce*, which is really what I am asked to do. Then besides that there appears another difficulty, even if this were the right Court, why is the application made to me? It is a matter for the registrar to determine, not one by way of motion to me. In any event, I think the proper course was to go to the County Court.

*Application refused.*

Solicitors : *Davidson & Morris* for the debtor Nicholson.  
*Stocken & Jupp* for Mr. Pearce.

Case referred to :—

*In re Walker, Ex parte Soanes*, see *ante*, Volume I. p. 193 ; L. R. 13 Q. B. D. 484.

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## PRACTICE.

### IN RE THOMAS, EX PARTE THE COMPTROLLER IN BANKRUPTCY.

BEFORE  
MR. JUSTICE  
CAVE.  
1886.

*February 15th.*

An order having been made by the County Court Judge against a trustee in a liquidation directing him to credit the estate of the debtor with certain moneys, such trustee appealed to Mr. Justice CAVE as Bankruptcy Judge, by whom the decision of the County Court was substantially affirmed, and a special order was made as to costs, and as to the required payments to be made by the trustee.

The trustee having failed to comply with the order, the Comptroller in Bankruptcy reported the default to Mr. Justice CAVE, and applied to enforce his report.

*Held* :—That the application ought to have been made to the County Court and must be refused.

THIS was an application on behalf of the Comptroller in Bankruptcy against *W. H. Edwards*, the trustee in the liquidation of *Thomas*, arising out of the following circumstances.

In the year 1884, the learned judge of the Isle of Wight County Court at Ryde, made an order against *Edwards*, directing him to credit the estate of the debtor with certain remuneration he had received, and other sums to the extent in all of 100*l.*

In November, 1884, *Edwards* appealed from this order to Mr. Justice CAVE, the Comptroller being the respondent in the Appeal, when the decision of the County Court Judge was substantially affirmed, and a special order was made both as to costs and as to the required payments to be made by the trustee.

The trustee, however, failed to comply with the terms of the order, either of the County Court or of Mr. Justice CAVE, and

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accordingly the Comptroller reported the default to Mr. Justice CAVE, and applied to enforce his report.

*Muir Mackenzie*, for the Comptroller in Bankruptcy.

The present application arises out of the order made by your Lordship, in November, 1884.

[CAVE, J. Why do you come here at all?]

By section 57 of the Bankruptcy Act, 1869, and Rule 251 of the Bankruptcy Rules, 1870, the Comptroller is to examine into the conduct of a trustee, and if necessary to report him to the Court. Upon that the case of *Ex parte Sidebotham*, *In re Sidebotham* (L. R. 14 Ch. Div. 458; 49 L. J. Bank. 41; 42 L. T. 783), was decided.

[CAVE, J. Yes, but why do you come here?]

The matter was fully considered, and whether rightly or wrongly, it was decided that it would be proper to make application to this Court. I may tell your Lordship that since notice was served of this application, the trustee has submitted accounts in which the amount claimed is credited to the estate. He has not performed the other part of your Lordship's order to pay the Comptroller's costs.

CAVE, J. :

Judgment.

I am of opinion that this application must be refused. The application ought to have been made to the County Court. It would to my mind be very inconvenient if, when an order is modified in this Court, all subsequent applications in the same matter should, where an order is so modified or varied, be made in this Court; and where an order is not modified to the County Court; or even should always be made in the High Court. As a primary inconvenience, it would involve sending all the documents up from the County Court. This motion was wrongly conceived, and is made in the wrong form. It must therefore be refused.

*Application refused.*

Solicitor: *The Solicitor to the Board of Trade*, for the Comptroller in Bankruptcy.

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Case referred to:—

*Ex parte Sidebotham, In re Sidebotham*, L. R. 14 Ch. Div. 458; 49 L. J. Bank. 41; 42 L. T. 788.

IN RE HORN, EX PARTE NASSAN.

BEFORE  
MR. JUSTICE  
CAVE.  
1886.

*Bankruptcy Act*, 1883, section 44, sub-section iii.

*Reputed ownership*:—Goods sent on “sale or return”—Custom of particular trade. February 16th.

*Held*: That upon the evidence given there is no custom in the furniture trade to deliver goods to dealers upon “sale or return” so as to prevent the operation of the reputed ownership clause—section 44, sub-section (iii), of the Bankruptcy Act, 1883.

The applicants deposited with the debtor certain oriental antiquities and curiosities, carpets, rugs, and other articles upon the terms of “sale or return,” which goods were in the possession of the debtor at the time of the bankruptcy, and were retained by the trustee.

*Held*: That when a custom is sought to be established, it lies upon the persons who affirm the existence of the custom to make it out; and that although a practice is undoubtedly creeping into the furniture trade of sending goods on sale or return, the evidence given was not sufficient to justify the Court in saying that the custom is an established one, and so common and notorious that a person making enquiry of those cognisant of the trade would be told there was no doubt of such custom.

THIS was an application on behalf of Messrs. *D. & S. Nassan*, dealers in furniture and antiquities, carrying on business in Great Portland Street, for an order that the trustee of the estate of the bankrupt, *James Horn*, house furnisher, High Street, Notting Hill, should deliver up certain oriental antiquities and curiosities,

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carpets, rugs, and other articles ; or, in the alternative, should pay to the applicants the invoiced value of the said goods.

The case raised the question whether a custom exists in the furniture trade to deliver goods to dealers upon "sale or return," so as to prevent the operation of the reputed ownership clause—section 44, sub-section (iii)—of the Bankruptcy Act, 1883.

About the month of July, 1885, it was agreed between Messrs. *Nassan* and the bankrupt *Horn*, that goods should be sent to the warehouse of the bankrupt upon the terms of "sale or return," and during the period between July and October, 1885, the articles now claimed were from time to time delivered, with each parcel of goods an invoice being made out for the same marked "sale or return."

Messrs. *Nassan* were in the habit of calling at intervals on the bankrupt for the purpose of ascertaining if any of the goods had been sold, and if such proved to be the case, a list of the goods so sold was furnished, and cash paid at the price at which they were invoiced. The depositors were also at liberty at any time to take away any of the goods.

*Horn* subsequently became bankrupt, and at the time of the bankruptcy the articles now claimed were in the debtor's possession.

The trustee having under the circumstances refused to deliver up the said goods, Messrs. *Nassan* now applied to the Court.

*Israel Davis* (*Evans-Austin* with him) for Messrs. *Nassan*.

The terms were called "sale or return," sometimes it is known as on commission. Messrs. *Nassan* deposit goods with people who can show them : the goods remain theirs : they call and take them away if not sold : when sold they receive the price marked on the invoice ; what is got above the invoice price the retailer takes for himself. In the bric-à-brac and furniture trade the custom is very well established. In order that goods of another person in the possession of a bankrupt should pass to his trustee, under section 44, sub-section (iii), of the Bankruptcy Act, 1883, it is necessary that the bankrupt should have been the reputed owner of the goods. That is clear from the decision in *Ex parte Wingfield*, *In re Florence* (L. R. 10 Ch. Div. 591 ; 40 L. T. 15). I shall

submit that the custom can be proved, but it is enough if I show facts sufficient to put persons on enquiry. If enough is showed to put a man who was about to give credit upon enquiry, it is sufficient. (Counsel also referred to *Ex parte Watkins*, *In re Couston*, L. R. 8 Ch. App. 520; 42 L. J. Bank. 50; 28 L. T. 798; *Hamilton v. Bell*, L. R. 10 Ex. 545; 24 L. J. Ex. 45; *Watson v. Peache*, 1 Bing. 327; 1 Scott, 149.) I propose to call ample evidence:—

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[*D. Nassan*, one of the applicants, said:—"The agreement was that the goods were to be left, and to be sold or returned. Whenever I liked I could take the goods back. I called every fortnight or ten days to see if the goods were sold. I have been 15 years in the business, and 5 years in London. The terms mentioned are known and customary in our trade. I have done business with many other firms on those terms."

*G. A. Bloomfield*, late assistant to Messrs. *Horn & Co.*, after stating the facts of the present transaction, said:—"At the houses where I have been this custom of dealing is a well-known one. I have been in the trade since 1878."

*W. H. Percival*, manager at Mr. Whiteley's, said:—"I know this custom of goods on sale or return. I have been for 25 years connected with the upholstery trade. The goods remain in our possession as long as the wholesale dealer wishes, or until we want a change. I have known them remain for 8 or 10 months. I speak of ordinary English furniture. I do not know anything of antiquities."

*C. H. Clayton*, manager to Messrs. Shoolbred, *J. Fleming*, House Furnisher, Orchard Street, and two other witnesses also spoke of the alleged custom.]

*J. Linklater*, for the trustee in the bankruptcy :

The custom has not been proved as it should have been proved in order to exclude the operation of the order and disposition clause. The fallacy in the proof is this: No single wholesale

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dealer has been called. There is no proof that the wholesale dealers know it, and they would be the persons who would give credit to dealers, and must prove the custom. In the case of *Ex parte Powell, In re Matthews* (L. R. 1 Ch. Div. 501; 45 L. J. Bank. 100; 34 L. T. 224), in which the cases of *Ex parte Watkins* and *Hamilton v. Bell* were cited, the judgment of the Court at page 507 was "that in order to establish a custom it must be proved to have existed so long, and to have been so extensively acted upon, that the ordinary creditors of the debtor in his trade may be reasonably presumed to have known it." It is no use calling the retailers who are benefited by the custom in order to prove it. I propose to call experienced men in the wholesale trade who say they know nothing of it.

[*C. Messent*, Secretary to the Furnishing Trade Association, said :—"I have been connected with the furnishing trade for 30 years. I know that goods are sometimes supplied to a retail house for the purpose of being shown to some particular customer requiring some special thing, but I never heard of the custom on sale or return for an indefinite time. Such a custom is news to me, and the evidence given on the other side takes me by surprise."

*G. Salmon*, manager to Messrs. Cook, Son, & Co., wholesale carpet manufacturers, Friday Street, said :—"I have been 30 years in the wholesale trade. I know of no such custom. We have no such custom in our firm, and I know of it in no other firm."

*V. Blumberg*, for 30 years an importer of fancy goods, and *E. W. Austin*, of Morris & Austin, Worship Street, also stated that no such custom was known to them.]

CAVE, J. :

Judgment.

In this case the question is whether certain goods belonging to the applicants were in the possession, order, or disposition of the bankrupt, so as to raise the reputation of ownership. It is not denied that they were in the possession of the bankrupt with the consent of the true owner, and the question is whether they were there under such circumstances as would raise the reputation of ownership. They must have been if no custom in the trade is proved.



Therefore the question arises whether there is a custom in the trade by which goods of this character are sent to retail dealers on "sale or return." If there is such a custom, then it cannot be said that these goods were in the disposition of the bankrupt under such circumstances as to give him the reputation of ownership. Now the decided cases explain what is meant. It is not necessary that individual creditors should know of the custom. But it is necessary that the custom should be common, and sufficiently notorious as to be known generally in the business, so that any creditor conversant with the particular trade, or making enquiries, might know it. Therefore, is it proved that such a custom does exist in this particular trade in the present case? I put out of sight the question of Oriental antiquities. The evidence given was not limited to Oriental antiquities, but included other things in the furnishing business. Now the evidence given was undoubtedly very contradictory. I do not take so much into account the evidence of the applicant himself. The evidence of interested parties is always a little untrustworthy. It is evident that he has been in the habit of doing business on sale or return, and he might easily exalt the practice into a custom in his own mind. Then *Bloomfield* was called, who says he knows of such a custom, and that it is well known. That in such cases the invoices are marked "sale or return," as they are in this case. So also the evidence of *Percival*, *Clayton*, and *Fleming*, was very strong. They say that there is such a custom, and that the term sometimes used is "on approbation," though I should myself have thought that there was a distinction between the terms "on approbation," and "sale or return." Two other witnesses spoke to the general custom, and the whole undoubtedly forms a strong body of evidence.

Now, on the other side, Mr. *Messent* was first called, and he says he does not know any such custom. His evidence is very strong, because if such a custom does exist he might reasonably be expected to know of it, both from his position as secretary to the Furnishing Trade Association, and from the length of time he has been in the business. Then *Salmon* and *Blumberg* say they know of no such custom, and the evidence of the latter is especially valuable, because he deals with goods of a similar nature to those of the applicant, though not quite the same. He explained the distinction between

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"on approbation," and "on sale or return." So also *Austin* said he knows of no such custom, and that forms a very strong body of evidence on the other side. It puts me in a position of considerable difficulty.

Now I think certainly that when a custom is sought to be established it lies upon the persons who affirm the existence of the custom to make it out. It is very difficult when several persons come and say they know of no such custom, to say that a custom is established. A practice is creeping in undoubtedly of sending and taking goods on sale or return. Some persons do it who desire to husband their capital. But is it done to such an extent as to amount to a custom of the trade? And is it done to such an extent that a person making enquiry of those cognisant of the trade would be told there was no doubt of such custom? The difficulty which I feel here is, does the evidence tell me it is an established custom? Looking at all the evidence I come to the conclusion—with some hesitation I admit—that the applicant has not succeeded in making out that such a custom exists. The application must therefore be refused with costs.

*Application refused with costs.*

Solicitors: *Atkinson & Dresser* for Messrs. Nassan.

*Linklater & Co.* for the trustee.

Cases relied upon or referred to:—

*Ex parte Wingfield, In re Florence*, L. R. 10 Ch. Div. 591; 40 L. T. 15.

*Ex parte Watkins, In re Couston*, L. R. 8 Ch. App. 520; 42 L. J. Bank. 50; 28 L. T. 793.

*Hamilton v. Bell*, L. R. 10 Ex. 545; 24 L. J. Ex. 45.

*Watson v. Peach*, 1 Bing. 327; 1 Scott, 149.

*Ex parte Powell, In re Matthews*, L. R. 1 Ch. Div. 501; 45 L. J. Bank. 100; 34 L. T. 224.

## PRACTICE.

IN RE GENESE, EX PARTE KEARSLEY &amp; CO.

BEFORE  
MR. JUSTICE  
CAYE.  
1886.*Bankruptcy Act, 1883, section 89**Marriage Settlement—Motion by creditor to declare the rights of the trustee in the February 17th. bankruptcy—Vivâ voce evidence.*

*Held:* (1) That when a trustee in a bankruptcy is of opinion that a motion to declare his rights should not be made and a creditor desires the motion to be made, the proper course is to make a preliminary motion to the Court for leave to use the name of the trustee on giving him an indemnity.

(2) That an application to be allowed to give *vivâ voce* evidence ought to be made beforehand and not at the same time with the motion upon the hearing of which it is desired to use such evidence.

THIS was an application made by Messrs. *Kearsley & Co.*, who were creditors of the bankrupt to the extent of 250*l.*, with the consent of certain other creditors of the amount of 1800*l.*, for an order declaring that a marriage settlement executed by the bankrupt was fraudulent and void against the trustee in the bankruptcy, and that certain property claimed by the trustees of the settlement belonged to the bankrupt's trustee.

*E. Cooper Willis, Q.C.* (*Muir Mackenzie* with him), for the applicants.

*Herbert Reed*, for the trustees of the marriage settlement.

*H. Kisch*, for the trustee in the bankruptcy.

*Herbert Reed:*

I have a preliminary objection. Such a proceeding as this has never been attempted. There is a trustee appointed in the bankruptcy, and it is not alleged that the trustee has refused to make the motion. An individual creditor cannot move to declare the rights of the bankrupt's trustee. When there is a bankruptcy, and a trustee is appointed, such trustee represents all the creditors, and every motion to this Court must be made by the trustee. All creditors are represented by the trustee, and by the trustee all

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motions to this Court must be made. Endless complications would ensue, and endless dangers arise if it were not so.

*H. Kisch :*

As representing the trustee in the bankruptcy I simply apply under section 89, sub-section (3), of the Bankruptcy Act, 1883, and Rule 229 for directions. I may say, however, that no application has been made to the trustee to apply to the Court to set aside this marriage settlement.

*E. C. Willis, Q.C. :*

It is a mistake to say that an application of this nature cannot be made. In the Text Book of Griffith & Holmes, at page 891, I find "Any creditor is interested in seeing that the creditor's assignees do their duty, and is justified in moving the Court to interfere to compel its performance, and even where the assignees are acting according to the best of their discretion, yet if the creditor thinks such discretion unsound, he may apply to the Court to interfere; but in such case he risks costs if the Court should think the assignees in the right." Also in the case of *Ex parte Sidebotham, In re Sidebotham* (L. R. 14 Ch. Div. 458; 49 L. J. Bank. 41; 42 L. T. 789), it was held that if the trustee has been guilty of a misfeasance, either the bankrupt or any of the creditors is entitled to make an application of his own to the Court, and if the person so applying is dissatisfied with the order made, he has a right to appeal from it. And in the case of *Ex parte Sheard, In re Pooley* (L. R. 16 Ch. Div. 110), the trustee in a bankruptcy presented an appeal against the admission of a proof. Before the appeal came on for hearing, the appellant had been removed from his office, and a new trustee appointed, who declined to prosecute the appeal. It was held that the appellant had no *locus standi*, but the appeal must stand over for a fortnight to give the creditors an opportunity of prosecuting it. (Counsel also referred to the case of *Ex parte Emmanuel, In re Batey*, L. R. 17 Ch. Div. 85).

[CAVE, J. Surely you ought to have applied for leave to do this.]

There is nothing in the Act to compel me to apply for leave.

CAVE, J. :

I am of opinion that a wrong course has been adopted here. In the event of the refusal of the trustee, the creditors ought to have come to the Court and asked for permission to use the trustee's name. It would be monstrous that any creditor whatever, no matter how impecunious he might be, if he happens to be dissatisfied with the general decision of the creditors, may give a notice of this kind. It would in my opinion be a course full of inconvenience, and unless strong authority were brought to my notice, I should not adopt it. The case of *Ex parte Sheard, In re Pooley* (L. R. 16 Ch. Div. 107), proves nothing of the sort. The Court of Appeal certainly did not say that any creditor, however impecunious, against the wishes of other creditors, might come and put the estate to the expense of a motion of this kind. When a trustee thinks a motion to declare his rights should not be made, and a creditor desires the motion to be made, the proper course is to make a preliminary motion for leave to use the name of the trustee, on giving him an indemnity. Then in another way the motion in the present case is all wrong. The motion is that leave will be asked to allow *vivâ voce* evidence. That ought to have been asked for before. If it is refused, all the case may drop to the ground. The motion must stand over for application to be made, and the costs will also stand over in order that I may see what order it is proper to make with regard to them at the hearing.

Solicitors : *Raphael*, for Messrs. Kearsley & Co.

*F. Kent*, for the trustees of the settlement.

Cases relied upon or referred to :—

*Ex parte Sidebotham, In re Sidebotham*, L. R. 14 Ch. Div. 458 ; 49 L. J. Bank. 41 ; 42 L. T. 783.

*Ex parte Sheard, In re Pooley*, L. R. 16 Ch. Div. 110.

*Ex parte Emmanuel, In re Batey*, L. R. 17 Ch. Div. 85.

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BEFORE  
MR. JUSTICE  
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1886.

February 19th.

IN RE WINSLOW, EX PARTE THE TRUSTEE.

*Bankruptcy Rules, 1883, rule 259.*

*"Books of Accounts"—Letters and Cheque Books—Claim of Trustee.*

*Held:* That letters, cheque-books and other general documents are not "books of accounts" within the meaning of Rule 259 of the Bankruptcy Rules, 1883, which can be claimed by the trustee in a bankruptcy, even though from such documents an account might be made up.

THIS was an application by the trustee in the bankruptcy of Dr. *Forbes Winslow*, for an order that certain documents retained by one *Fryzer*, the former landlord of the bankrupt, might be delivered up to such trustee, under Rule 259 of the Bankruptcy Rules, 1883.

Rule 259 provides that, "No person shall, as against the official receiver or trustee, be entitled to withhold possession of the books of accounts belonging to the debtor, or to set up any lien thereon."

Some time previous to his bankruptcy, Dr. *Forbes Winslow* took certain rooms in the house of Mr. *Fryzer*, and difficulties having arisen with regard to the payment of rent, an agreement was entered into by the terms of which certain documents consisting of correspondence, cheque-books with counterfoils, and other papers belonging to the debtor, were made subject to the ordinary rights of a landlord in the event of rent not being paid.

Arrears of rent being due to the extent of 100*l.*, the landlord distrained on the debtor's goods and sold them, and also now sought to retain the documents which were claimed by the trustee in the bankruptcy of *Winslow*, until he received the residue of the debt owing to him.

*Hume Williams*, for the trustee :

The application is made under Rule 259 of the Bankruptcy Rules, 1883. The documents in question are not strictly books of accounts, but they are materials from which an account might be made up. The trustee says that the documents are essential to enable him to properly investigate the debtor's affairs. They would also enable the debtor himself to submit a much better statement of affairs than that now filed.

*J. D. Fitzgerald*, for Mr. Fryzer :

The documents claimed are not books of accounts at all. A doctor's books of account are his fee books and cash books. These have been given up to the trustee. The only things at all approaching to the definition which the landlord holds, are some old cheque-books, and they are not books of accounts. In the case of *In re Capital Fire Insurance Association* (L. R. 24 Ch. Div. 408), where an order having been made for winding up a company, applications were made by the official liquidator against a solicitor employed by the company before the winding up, that he might be ordered to deliver up certain documents, upon which he claimed a lien, which application in respect of certain letters of application and other papers relating to allotment of shares was refused. Lord Justice Cotton said: "It may be said that this will place the liquidator and the company in a position of great difficulty. The answer is, that if persons do not pay their solicitors they may get into difficulty." That disposes of the question that the trustee in this case may be placed in a position of difficulty.

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CAVE, J. :

I am of opinion that this application must be refused. The Judgment trustee has come to the Court under Rule 259 to ask for books of accounts. The answer of the respondent is that he has no books of accounts in his possession. That is a perfect answer until the contrary is proved. But the trustee says that the respondent possesses vouchers, letters and old cheque-books from which an account might be made up. Now I have no doubt that it would be exceedingly convenient, and perhaps desirable to the trustee and to Dr. Winslow, to obtain possession of these documents, but I cannot see that I have any power to make an order for them to be delivered up. The rule specifically says, "books of accounts" and no more. I cannot agree that cheque-books, letters, and general documents can be considered to be books of accounts. The rule is a strong rule. It takes away from creditors a security which they might otherwise possess, and it must be construed strictly. I am of opinion, that I have no power to stretch the language of the rule in order to

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include cheque-books and other documents, which are not books of accounts, and do not come within the ordinary acceptance of the term. The application must therefore be dismissed.

*Application dismissed.*

Solicitors : *C. J. Coles* for the trustee.

*Valpy, Chaplin, & Peckham* for Mr. Fryzer.

Case relied upon :—

*In re Capital Fire Insurance Association*, L. R. 24 Ch. Div. 408.

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## PRACTICE.

### IN RE BROOKS.

BEFORE  
MR. JUSTICE  
CAVE.  
1886.  
Feb. 22nd.

*Bankruptcy Act, 1883, section 99.*

It is the duty of the registrar to hear and determine an application made *ex parte* for an injunction, even though at the time of such application the Judge in Bankruptcy may be sitting.

THIS was an *ex parte* application for an injunction to restrain the sale of certain furniture claimed by the applicants, such sale, it was alleged, being arranged to take place on the present afternoon.

The application had previously been made to the registrar, who had declined to deal with it, and had intimated his desire that as the Judge in Bankruptcy was then sitting, the application should be made to him.

*F. C. Willis*, in support :

The registrar simply said that as your Lordship was sitting he would prefer that your Lordship should decide the question.



CAVE, J :

It is a matter for the registrar. Under the circumstances I will hear you to-day, but these questions are for the registrar, and in any subsequent case which may arise, you will intimate that I have said so.

*The application was then heard and refused, but leave given to serve short notice of motion for the following morning.*

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## PRACTICE.

IN RE SMITH, EX PARTE THE TRUSTEE.

BEFORE  
MR. JUSTICE  
CAVE,  
1886.  
Feb. 22nd.

*Bankruptcy Act, 1883, section 10, sub-section (1), and section 40, sub-section (1).*

*Bankruptcy petition—Interim receiving-order—Wages of clerk or servant paid by Official Receiver—Practice.*

*Held:* (1) That although the words in section 40 of the Bankruptcy Act, 1883, which direct the payment in priority of "all wages or salary of any clerk or servant in respect of services rendered to the bankrupt during four months before the date of the receiving order," apply to the four months immediately preceding the date of the receiving order, nevertheless, looking at the fact that one object of the Act was to secure and protect the wages of such clerks or servants, the Legislature must have intended to designate that date at which a bankrupt is deprived of all control over his property and the receipts cease to go into his hands, by the appointment of the official receiver as interim receiver.

Therefore, where a bankruptcy petition was presented against a debtor on March 7th, and the official receiver was appointed interim receiver on March 13th, but it was not until August 21st that a receiving order was made and the debtor adjudicated bankrupt; and the official receiver on August 27th paid to a servant of the bankrupt wages in full for four months preceding March 13th, and the trustee applied that the money so paid might be refunded by the official receiver, the application for such repayment was refused.

*Held:* (2) That the proper course for the trustee to have pursued would have been to report the matter to the Board of Trade in accordance with the provisions of Rule 249 of the Bankruptcy Rules, 1883, and in the event of the Board of Trade declining to take the steps desired, to have moved

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the Court for an order directing the Board of Trade and the official receiver together to shew cause why the moneys should not be refunded.

**T**HIS was an application on behalf of the trustee in the bankruptcy for the repayment by the Official Receiver of the sum of £16 5s., which said sum had been paid out by the Official Receiver under the following circumstances:—

On March 7th, 1885, a bankruptcy petition was presented against the debtor *Smith*; and on March 18th, an order was made under section 10, sub-section (1), of the Bankruptcy Act, 1883, appointing the official receiver to be interim receiver of the property of the debtor.

It was not until August 21st, 1885, however, that a receiving order was made and the debtor was adjudicated bankrupt.

On August 27th, the official receiver paid to a certain servant of the bankrupt the above-mentioned sum of £16 5s., being the full amount of wages due to him in respect of services rendered to the bankrupt during the four months preceding March 18th, upon which date the official receiver was appointed interim receiver of the debtor's property.

The trustee appointed in the bankruptcy now raised the question whether the official receiver was justified in making such payment for the period preceding the interim order.

Section 10, sub-section (1), of the Bankruptcy Act, 1883, provides that "The Court may, if it is shewn to be necessary for the protection of the estate, at any time after the presentation of a bankruptcy petition, and before a receiving order is made, appoint the official receiver to be interim receiver of the property of the debtor, or of any part thereof, and direct him to take immediate possession thereof or of any part thereof."

And section 40, sub-section (1), provides that, "In the distribution of the property of a bankrupt there shall be paid in priority to all other debts:— . . . (b). All wages or salary of any clerk or servant in respect of services rendered to the bankrupt during four months before the date of the receiving order, not exceeding fifty pounds."

*Wedderburn*, for the trustee in the bankruptcy:

Section 40 clearly states that claims by a clerk or servant shall be limited to four months before the date of the receiving order. In the present case this period commenced at a date subsequent to the presentation of the petition and subsequent to the order appointing the official receiver interim receiver. The question therefore arises whether the official receiver was justified in making this payment which he has made. The question is a serious one, as there are other creditors of a similar nature who are making similar claims upon the trustee, and if those claims are valid the dividend to the general creditors will be materially diminished. By the Act 6 Geo. 4, c. 16, s. 48, when any bankrupt was indebted at the time of the commission for wages, it was lawful for the commissioners to order payment of six months' wages. In the Bankruptcy Act, 1869, the discretionary power was removed, and it was enacted by section 32 that, "The debts hereinafter mentioned shall be paid in priority to all other debts. . . . (2) All wages or salary of any clerk or servant in the employment of the bankrupt at the date of the order of adjudication, not exceeding four months' wages or salary, and not exceeding fifty pounds." So in the present Bankruptcy Act of 1883, such wages shall be paid in priority to all other debts, but the date of the receiving order is substituted for that of the order of adjudication. The four months mentioned in the section must be those immediately preceding the receiving order.

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*Muir Mackenzie* for the official receiver :

The section must in its intention clearly apply to wages accrued at the time of presenting the petition, or at any rate at the time when the interim order is made. This must be so because from that point up to the making of the receiving order, any delay which may occur is wholly beyond the control of the persons to whom the wages may be due. Under certain circumstances no other interpretation can be put upon the section, except that the receiving order mentioned in the section is the same as an order which constitutes the official receiver interim receiver of the debtor's property. An order appointing the official receiver interim receiver is practically equivalent to a receiving order, inasmuch as it deprives the debtor of all control over his property. It would be

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a very great hardship upon creditors of this class if any other interpretation should be given to the section. Further, I would point out to your Lordship that by Rule 249 of the Bankruptcy Rules, 1883, it is provided, “(2) Where a debtor is adjudged bankrupt, and a trustee is appointed, the official receiver shall account to the trustee in the bankruptcy. (3) If the debtor, or as the case may be, the trustee, is dissatisfied with the account or any part thereof, he may report the matter to the Board of Trade, who shall take such action (if any) thereon as it may deem expedient.” In any case, therefore, the application ought to have been made in the first instance to the Board of Trade.

*Wedderburn* in reply :

Rule 249 only says that if the trustee is dissatisfied with the account furnished by the official receiver, “he may report the matter to the Board of Trade.” Section 101 of the Act shows that the Court has power over the Board of Trade as well as over the official receiver.

CAVE, J. :

Judgment.

This is a motion calling upon the official receiver to show cause why he should not be ordered to pay over a certain sum of 16*l.* 5*s.* to the trustee in the bankruptcy of the debtor *Smith*. The facts are admitted, and the case really turns upon the construction of section 40 of the Bankruptcy Act, 1883. That section provides :— “(1) In the distribution of the property of a bankrupt there shall be paid in priority to all other debts . . . (b) all wages or salary of any clerk or servant in respect of services rendered to the bankrupt during four months before the date of the receiving order, not exceeding fifty pounds.” Now taking these words in their natural sense according to ordinary rules there can be no doubt the first impression would be that where a claim for priority of this kind is to be successfully made there must be services rendered—the services must be rendered to the bankrupt—and they must be rendered within the four months preceding the date of the receiving order. That would be the natural construction, and further, that if the services rendered are outside the limit of time specified, they

are, whether it was so intended or not, outside the protection of the Act. But it is necessary to look still further and to see what the results of such a construction would be. In this case it would come to this, that the clerks and servants of the bankrupt would be entitled only to claim wages between April 21st and August 21st, upon which latter date the receiving order was made. They would in fact be entitled to nothing since the official receiver was appointed interim receiver of the debtor's estate at a date anterior to the earliest possible limit of any claim by them. It has been urged that the payment should be confined to the four months preceding August 21st, and I must admit that the words of the section afford very strong justification for that argument. In the Act of 1869 the expressions were perfectly clear, and no difficulty was presented by them, but those expressions have for some reason or other been omitted and altered in the present Act. I do not pretend to know why this has been done, but I must confess needless difficulties appear to have been imported into the present Act by the use of ill-selected language. Upon the plain and strict interpretation of the words of the section as it stands I cannot help thinking that the contention of Mr. Wedderburn is correct, and that the four months indicated are the four months immediately preceding the date of the receiving order.

But Mr. Mackenzie took a further point with regard to the actual meaning of the words "receiving order" as used in section 40. He pointed out that an order appointing the official receiver interim receiver was practically equivalent to a receiving order, inasmuch as it deprived the bankrupt of all control over his property. That contention finds its justification in this, that if the contrary argument were correct, then in any case where there was any delay in the making of a receiving order clerks and servants would run the risk of losing their wages altogether. It is quite certain that one object of the Act was to secure and protect the wages of such clerks and servants, and of others in a similar position. The intention was to protect, not to deprive them of the fruits of their labours. It appears obvious that the Legislature must have had in view not the period at which the receiving order is actually made, but the period at which the receipts cease to go into the bankrupt's hands. When an interim receiving order is made the

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clerk or servant can no longer obtain any payment from the bankrupt himself, and if it is to be contended that the official receiver acting as interim receiver, may not pay the wages, then the payment of wages can in no way be secured to these people, who would be compelled to see their claims diminished through a delay in which they had no part and which they could not prevent in any way. This would be in the face of the preferential claims which the Legislature has deliberately conferred upon them. I am well aware that it is not in accordance with the strict language of the Act to say that the date of an interim order is the same thing as the date of a receiving order, but looking at the various difficulties which surround a strict interpretation of the section, I cannot help thinking that what the Legislature had in view was such an order as would deprive the bankrupt of the receipts of his business and leave him no other means of paying his servants. By this construction it is true I may do some violence to the language of the statute, but I feel confident that I am following the spirit in which it was enacted.

Another point has arisen in this case with regard to the practice on which it is also desirable that I should speak. There is a power over the official receiver exerciseable by the Court under general clauses, but where by the rules a special course of procedure is indicated, the course thus pointed out should be followed. By Rule 249 of the Bankruptcy Rules, 1883, it is provided: "(2) Where a debtor is adjudged bankrupt, and a trustee is appointed, the official receiver shall account to the trustee in the bankruptcy. (3) If the debtor, or as the case may be, the trustee, is dissatisfied with the account or any part thereof, he may report the matter to the Board of Trade, who shall take such action (if any) thereon as it may deem expedient." The trustee and the official receiver may differ from each other upon the question of accounts, and the rule provides a convenient course which may then be adopted. The trustee may under such circumstances apply to the Board of Trade. The official receiver is an officer of the Board of Trade, and this matter of receiving and accounting for assets is peculiarly within the province of that department. If, when a report is made, the Board of Trade should think that the official receiver has paid away any moneys wrongfully, he will be ordered to make

repayment. If it should think otherwise, then the right course would be to move this Court for an order directing the Board of Trade and the official receiver together to show cause why payment should not be made. But it is in my opinion convenient that the matter should first be reported to the Board of Trade.

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In the present case it is not necessary to decide whether that has been done, for the application has failed upon the merits, and must be dismissed with costs, but the trustee may recoup himself out of the estate.

*Application dismissed with costs.*

Solicitors : *Harrison & Sons*, for the trustee.

*W. W. Aldridge* for the official receiver.

## PRACTICE.

IN RE WALKER.

*Bankruptcy Act, 1883, section 108.*

*Special Case—Petition by Debtor—Death of Debtor—Subsequent Resolutions of Creditors that proceedings be continued.*

DIVISIONAL  
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BEFORE  
CAVE, J.,  
and  
GRANTHAM, J.  
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Where a debtor died two days after presenting his petition in the County Court, and at the subsequent first meeting of the creditors resolutions were passed that the proceedings be continued and the estate administered by a trustee as if such debtor were alive and had been adjudicated bankrupt, but the County Court Judge declined to confirm such resolutions, and stated a case for the opinion of the High Court.

*Held* : That the intention of the Legislature in framing section 108 of the Bankruptcy Act, 1883, which provides for the continuance of proceedings on the death of a debtor by or against whom a bankruptcy petition has been presented, was to meet a case of this nature : and that the proper course for the Court to pursue, in the absence of any arrangement on the

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part of the representatives of the deceased debtor, was to make an order of adjudication against him and allow the matter to proceed in the ordinary way.

**T**HIS was a special case stated by the learned judge of the Birmingham County Court for the opinion of the High Court, as follows:—

On January 20th, 1886, the debtor, *William Walker*, of the Staffordshire Brewery, Birchfield, filed a petition in bankruptcy in the Birmingham County Court, and on the same day a receiving order was made thereon, the official receiver of the Court being thereby constituted receiver of the estate.

On January 22nd, 1886, the debtor died.

On February 12th, 1886, the first meeting of the creditors was held under the proceedings and adjourned until the 17th, when the following resolutions were passed:—(1) That the debtor having died since the date of the petition, viz., on January 22nd, 1886, these proceedings be continued as if he were alive and had been adjudicated bankrupt, and that his estate be administered accordingly. (2) That *Mr. E. J. Abbott* . . . shall be trustee of the property of the debtor. (3) That the official receiver do apply to the Court for an order confirming these resolutions, and vesting the estate both real and personal of the said *William Walker* in the said *E. J. Abbott* as such trustee as aforesaid.

Application was accordingly made to the County Court Judge on February 18th, 1886, on behalf of the official receiver, to confirm the said resolutions of the first meeting of creditors, and, if necessary, that an order of adjudication should be made against the deceased debtor.

It appeared, however, to the learned judge that the case involved a question of difficulty, and also of general importance. “On the one hand, he was loth to make an order of adjudication against a deceased man, as adjudication is a process affecting civil status. On the other hand, the Act appears to contemplate adjudication as a necessary preliminary to the vesting of the debtor's property in a trustee.”

The questions stated by him for the opinion of the High Court, therefore, were:—



- (1.) Whether the deceased debtor could and should be adjudicated bankrupt in order to carry out the resolutions of the creditors.
- (2.) If not, whether an order could be made, vesting the debtor's property in the trustee appointed by the creditors, and directing the estate to be administered as under an adjudication in bankruptcy.
- (3.) If so, whether such order as aforesaid required to be gazetted, and advertised in like manner as an order of adjudication.

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*Muir Mackenzie* for the official receiver :

Section 108 of the Bankruptcy Act, 1883, provides :—"If a debtor by or against whom a bankruptcy petition has been presented dies, the proceedings in the matter shall, unless the Court otherwise orders, be continued as if he were alive." Here the receiving order was made on January 20th : the debtor died on January 22nd : and on February 17th the first meeting of creditors passed the resolutions to the effect that the proceedings should be continued. It is material, I think, to call attention to the sections of the Act leading up to and dealing with adjudication. By section 16, when a receiving order has been made the debtor must at once submit his statement of affairs. Section 17 provides for his public examination. Then section 18 gives power to the creditors to accept a composition or scheme of arrangement. Then section 20 provides : "(1) Where a receiving order is made against a debtor, then, if the creditors at the first meeting or any adjournment thereof by ordinary resolution, resolve that the debtor be adjudged bankrupt, or pass no resolution, or if the creditors do not meet, or if a composition or scheme is not accepted or approved in pursuance of this Act within fourteen days after the conclusion of the examination of the debtor, or such further time as the Court may allow, the Court shall adjudge the debtor bankrupt ; and thereupon the property of the bankrupt shall become divisible among his creditors, and shall vest in a trustee." And by subsection (2) such order of adjudication is to be gazetted and advertised. (Counsel also referred to Rules 155 and 156 of the Bankruptcy Rules, 1883.)

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The Bankruptcy Act, 1869, in section 80, dealt only with the death of a debtor who had been adjudicated bankrupt; and in the case of *In re Obbard* (24 L. T. 145), it was held that if a debtor died after presenting his petition but before the first meeting, the Court had no power to order the liquidation to proceed. But I submit that section 108 of the Act of 1883 gives the necessary power. A receiving order is clearly a "proceeding in the matter."

CAYE, J. :

Judgment.

We desired to hear the argument in full in this case because no one appeared on the other side, but when one comes to look into the Act it appears quite clear the intention of the Legislature was that, after a petition has been presented, that thing shall not occur which did occur under the previous Act. Under section 80 of the Bankruptcy Act, 1869, when a debtor who had been adjudicated a bankrupt died, the Court might order that the proceedings in the matter be continued as if he were alive. There it might be done only after adjudication, and that was found to be an inconvenience. Therefore section 108 of the Act of 1883 provides that "if a debtor by or against whom a bankruptcy petition has been presented dies, the proceedings in the matter shall, unless the Court otherwise orders, be continued as if he were alive." The Legislature in framing this section must have had before it the difference between the presentation of a petition and an adjudication, and it says expressly "if a debtor by or against whom a bankruptcy petition has been presented," dies, the proceedings shall be continued. They are to be continued in bankruptcy. They cannot be continued under section 125 of the Act because there the petition is presented after the death of the debtor. Now if they are to be continued, the Court must proceed in the best way, and the ordinary mode would be by an adjudication in bankruptcy. Why should not it take place here? I must say that I see no reason why it should not. The Court finds and orders that the person has become bankrupt. Here the man presented his own petition and was in a state of bankruptcy, and all the Court does is to put the official seal on that act. There is nothing contrary to the nature of the thing in adjudicating a man a bankrupt after he is dead. Nor can I see that there

is any injustice in it. The representatives are at liberty to try to make arrangements with the creditors if they so wish, and if they do so the Court would, no doubt, consider that it ought to "otherwise order" under section 108. If, for example, the representatives say that they will pay the debts in full, that would be a good reason for the Court to hold its hand. There is, to my mind, no injustice in allowing the Court to adjudicate in bankruptcy after death as it might before. The proper course, therefore, in the absence of any objection, is to make the order of adjudication, and to let it proceed in the ordinary way.

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GRANTHAM, J.:

I am of the same opinion. I think the alteration in the Act of 1888 was made specially to meet a case of this kind. There is no injustice so far as I can see. The representatives of a deceased debtor may very well make some offer similar to that of a debtor under section 18. Here it must be remembered the petition was by the debtor himself. The language of section 108 is very clear, and in my opinion we should not be doing our duty if we were to say that the exact converse of section 108 ought to take place.

Solicitor: *The Solicitor to the Board of Trade*, for the official receiver.

Case referred to:

*In re Obbard*, 24 L. T. 145.

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## PRACTICE.

## IN RE MOON.

DIVISIONAL  
COURT.BEFORE  
CAVE, J.  
and  
GRANTHAM, J.  
1886.  
March 1st.*Bankruptcy Appeals (County Courts) Act, 1884, section (2).**Bankruptcy Act, 1883, section 27.**Application for a Stay—Application made to Divisional Court of which the Judge in Bankruptcy was not a member.*

Where application was made, pending appeal, for a stay of proceedings on a warrant granted by a County Court, to a Divisional Court of the High Court of Justice of which the Judge to whom Bankruptcy business is assigned was not a member.

*Held:* That Mr. Justice CAVE not being a member of such Divisional Court it had no jurisdiction to hear and decide upon the application.

On application subsequently made to a Divisional Court sitting in Bankruptcy, a stay of proceedings granted.

THIS was an *ex parte* application on behalf of one *Menzies* for a stay of proceedings on a warrant granted by the Judge of the Salisbury County Court, under section 27 of the Bankruptcy Act, 1883.

Section 27 provides:—“(1) The Court may, on the application of the official receiver or trustee, at any time after a receiving order has been made against a debtor, summon before it the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the Court may deem capable of giving information respecting the debtor, his dealings or property, and the Court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings or property. (2) If any person so summoned after having been tendered a reasonable sum, refuses to come before the Court at the time appointed, or refuses to produce any such document, having no lawful impediment made known to the Court at the time of its sitting and allowed by it, the Court may, by warrant cause him to be apprehended and brought up for examination.”

Against the order of the County Court, on which the warrant had issued, an appeal was lodged, but had not yet come on for

hearing, and the present application was for a stay of proceedings until the appeal could be heard.

On the previous Friday—February 26th—a similar application was made to a Divisional Court consisting of Mr. Justice GROVE and Mr. Justice STEPHEN and was refused, those learned judges stating that in their opinion the Divisional Court had no jurisdiction unless Mr. Justice CAVE as the judge in bankruptcy, was a member of the Court. (*See Bankruptcy Appeals (County Courts) Act, 1884, 47 Vict. c. 9.*)

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*R. V. Williams* for Mr. Menzies :

I simply ask for a stay until the appeal can be heard. The Divisional Court refused to entertain the motion, because the learned judges considered that they had no jurisdiction unless your lordship—Mr. Justice CAVE—sat as a member of the Court. Section 27, sub-section (2), was not intended to be used on arrest, unless the person applied to is contumacious.

CAVE, J. :

I think you are entitled to a stay until the appeal can be heard.

# IN RE WOODWARD, EX PARTE HUGGINS.

*Bankruptcy Act, 1883, section 44, sub-section (iii).*

*Reputed Ownership—Custom of Particular Trade—Agistment.*

Where a cattle dealer placed certain stock on the lands of a farmer upon an agreement whereby such stock remained the property of the dealer, who at the end of the fixed period was to sell the stock, and, after deducting the original price together with a percentage for profit, was to hand over the balance to the farmer : and during the continuance of the agreement the farmer became bankrupt, whereupon the trustee in the bankruptcy claimed the stock in question as being in the reputed ownership of the bankrupt within section 44, subsection (iii), of the Bankruptcy Act, 1883.

*Held :* That the custom of agistment was notorious and one which the

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BEFORE  
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and  
GRANTHAM, J.  
1886.  
March 2nd.

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HUGGINS.

ordinary creditors of the bankrupt might reasonably be presumed to have known : and that such being the case no reputation of ownership could arise with respect to the stock upon the lands of a farmer.

THIS was an appeal from an order of the learned Judge of the Norwich County Court, declaring that certain ewes and lambs which were the property of the appellant *Huggins*, had been in the order and disposition of the bankrupt at the time of his bankruptcy, and therefore passed to the trustee.

By an arrangement entered into between the debtor *Woodward*, who was a farmer in Norfolk, and *Huggins*, it was agreed that the latter, who carried on business as a cattle dealer, should place upon *Woodward's* land certain ewes, for which *Woodward* should provide tups for breeding purposes.

The property in the ewes remained in *Huggins* throughout, but at the end of the year such ewes and lambs were to be sold by him, and after deducting the original price and a certain percentage for profit, it was agreed that he should hand over the balance to *Woodward*.

During the continuance of this agreement *Woodward* became bankrupt, upon which the trustee claimed the ewes in question as being in the order and disposition of the bankrupt at the commencement of the bankruptcy, within section 44, subsection (iii) of the Bankruptcy Act, 1883.

The County Court Judge having decided in favour of the trustee, *Huggins* now appealed.

*Winslow, Q.C.* (*F. C. Willis* with him), for the appellant, on stating the facts were stopped by the Court.

*Lumley Smith, Q.C.* (*Yate Lee* with him), for the trustee in the bankruptcy.

The custom of agistment is not a notorious one.

[CAVE, J. I think surely it is.]

In any event that would not touch such an arrangement as this.  
[Counsel referred to *Ex parte Powell, In re Matthews*, L. R. 1 Ch.

Div. 501; 45 L. J. Bank. 100; 34 L. T. 224; 24 W. R. 378].  
Then there is the question whether the property did not pass.

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CAVE, J. :

I am of opinion that the order of the County Court Judge must Judgment.  
be set aside. Two points have been raised in the case. The first is, whether the property in these ewes passed to *Woodward*. That question the County Court Judge has answered in *Huggins's* favour, and I am satisfied that he could not properly have come to any other conclusion. The arrangement made appears to have been a very simple one. The farmer was deficient in stock and money, the dealer had both, and therefore for their mutual benefit they entered into the agreement in question. With regard to what has been said, that the transaction involves the passing of property, that depends entirely on the intention of the parties, and it is clear in this case that *Huggins* had no intention to pass the property in the ewes. There is no reason why the property should have passed, and the fact that it does not enables the dealer and the farmer to gain a mutual advantage. Nor do I see that such a transaction as this is a hardship on the farmer. He is really rather better off than if he had to find the purchase-money. The transaction is advantageous to the farmer, and it is probably a benefit to the dealer, for otherwise he would not have entered into it. At the end of the fixed time it was the dealer who was to sell the stock, and I am satisfied that on this point the County Court Judge came to a right conclusion. But the next question is, whether these ewes were, at the commencement of the bankruptcy, in the possession, order or disposition of the bankrupt, in his trade or business, under such circumstances, that he was the reputed owner. On this point some little misunderstanding appears to have taken place in the Court below. It seems to have been considered that it was necessary to prove a custom of agistment to be notorious to all the world. What it is necessary to prove in such a case is that the custom is one which the ordinary creditors of the bankrupt may be reasonably presumed to have known. Where there is a custom generally known to the trade there is no reputation of ownership. There is a well-known custom of agisting sheep, and when this is established no question of reputed ownership can arise. When we

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come to look how this was met, we find that somebody in the neighbourhood was prevailed upon to make an affidavit, in which he says that he did not know that these particular sheep were not Woodward's property. No one has ventured to swear that he was not aware of the well-known custom of agistment, and the appeal must therefore be allowed with costs.

GRANTHAM, J. : I am of the same opinion.

*Yate Lee* : Will your Lordships give leave to appeal ?

CAVE, J. : No.

*Appeal allowed with costs.*

Solicitors : *Johnson & Master*, for the appellant.

*Oldman*, for the trustee in the bankruptcy.

Case referred to :—

*Ex parte Powell, In re Matthews*, L. R. 1 Ch. Div. 501 ; 45  
L. J. Bank. 100 ; 34 L. T. 224 ; 24 W. R. 378.

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COURT.  
BEFORE  
CAVE, J.,  
and  
GRANTHAM, J.  
1886.  
March 3rd.

IN RE STRICK, EX PARTE MARTIN.

*Bankruptcy Act*, 1883, section 107, and section 95.

*Bankruptcy Rules*, 1883, rules 126 and 154.

*Receiving Order made in High Court and also in County Court—Place of Business of Debtor—Delay of Petitioning Creditor.*

On February 19th, 1885, a petition was presented against the debtor in the London Bankruptcy Court, but the hearing of such petition was subsequently adjourned from time to time with the consent of the petitioning creditor.

On January 5th, 1886, a receiving order was made on this petition in the High Court at 11.30 o'clock, and on the same day at 1 o'clock, a



receiving order was also made against the debtor in the Swansea County Court at the instance of another creditor.

On an appeal by the creditor presenting the petition in London to set aside such order of the County Court.

*Held:* That from the evidence it appeared clear that the legitimate business of the debtor was carried on in Swansea, which was *prima facie* the place where his business transactions ought to be investigated: and that the petitioning creditor in London having for his own purposes delayed for several months to proceed with his petition, the proper course for the Court to pursue was not to interfere with the order of the County Court, and application to be made to the London Court to stay the proceedings there.

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THIS was an appeal on behalf of one *J. Martin* to set aside a receiving order made against the debtor *Strick*, on January 5th last, in the Swansea County Court at the instance of Messrs. *Meager, Watson & Co.*

On February 19th, 1885, *Martin*, the present appellant, presented a petition against *Strick* in the London Bankruptcy Court, but the further proceedings in the matter were adjourned from time to time with the creditor's consent, in order to see whether some arrangement could be arrived at.

Eventually, however, on January 5th, 1886, this petition came on for hearing, and a receiving order was made against the debtor in the London Court at 11.30 o'clock on that day.

On the same day—January 5th—at 1 o'clock, a receiving order was also made against the debtor in the Swansea County Court, upon a petition presented there by Messrs. *Meager, Watson & Co.*

The present appeal on behalf of *J. Martin* was for an order to set aside the order of the County Court, and that he might be declared to be the petitioning creditor.

*F. C. Willis* for Mr. *Martin*.

The receiving order made in London ought to stand. A telegram was sent to Swansea, and the receiving order in London was brought to the notice of the County Court before the order was made there. Under Rule 154 of the Bankruptcy Rules, 1883, a petitioning creditor is 10*l.* out of pocket up to the date of the receiving order, but when a receiving order is made he is entitled to an order for his costs to be paid. Here, so far as I can understand, it

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is suggested by the other side that the London Court is wrong, because, as they allege, the debtor has carried on business for the greater part of the six months prior to their petition in Swansea. With regard to that I say that this is not the proper time and place to take this point. It is a question for appeal under section 104 of the Act. The person aggrieved must appeal to the Court of Appeal within twenty-one days. No appeal has been lodged. Further by section 95, subsection (3), it is provided that nothing in that section "shall invalidate a proceeding by reason of its being taken in a wrong Court." And in the case of *In re Brightmore, Ex parte May* (see *ante*, Volume I. p. 253, L. R. 14 Q. B. D. 37), it was held "that where a bankruptcy petition is presented in the wrong Court by inadvertence, such Court has jurisdiction to hear the petition and to make a receiving order." Moreover, in this case, there is no proof whatever that *Martin's* petition was presented in the wrong Court. The other side only say that for six months prior to their petition the debtor has carried on business at Swansea. The gross liabilities are very heavy, and there are only some thirty creditors representing about 1500*l.* in Glamorganshire. *Martin's* debt is for 300*l.*

*A. Cross*, for Messrs. Meager, Watson & Co.

In 1872 the debtor carried on business at Swansea in partnership with his brother. Since 1882 he has carried on business alone, and at the present time he is an agent to the Pyle Manufactory at Swansea. He lived only at Swansea, and he had an office there. I have an affidavit made by his clerk in which he says that the only London address of his master that he ever knew was to the Whitehall Club, and all communications to the debtor when he happened to be in town were forwarded there. Rule 126 of the Bankruptcy Rules, 1883, prescribes that "where a debtor has for the greater part of six months next preceding the presentation of a bankruptcy petition, carried on business within the district of one Court and resided within the district of another Court, the petition shall be filed in the Court within the district of which he has carried on business." I submit that the proper Court at the date of both petitions was at Swansea.

[The debtor *Strick* was here called and examined.]

[CAVE, J. I do not think we ought to interfere. When we look at the facts if the debtor had been petitioned against at Swansea, everybody would have known about it. No one knew of the petition in London which was hanging over for eight months or more, and then when the London creditor heard of another petition he rushed in and got a receiving order. The petitioning creditor in London seems to have been making use of the petition for his own purposes, not necessarily improperly, but I cannot see what benefit the adjournments gave to the creditors generally. Under section 107 of the Act, where due diligence is not displayed the Court may substitute another creditor as petitioning creditor. Are you willing, Mr. *Willis*, that we should substitute the Swansea creditor for your client?]

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*F. C. Willis*: I am willing only if my client can thus have his costs. The proceedings cannot go on concurrently.

CAVE, J.:

This is a motion to set aside a receiving order made by the Judgment. County Court Judge at Swansea on the grounds that a receiving order had been made previously in London. The order was made at 11.30 in London, and at 1 o'clock in the County Court on the same day. When we look into the circumstances of the case it appears that for some time back the bankrupt did carry on business in Swansea, but for the past eighteen months he has been agent of a Swansea firm. His legitimate business was at Swansea. He also had a speculative business at Cardiff and Newport, and he says also in London, but I must confess I can find no proof of that. All I can find is that he had a bedroom in Jermyn Street. But his wife and child lived at Swansea, and it is clear that the bulk of his general business transactions were at that place. *Primâ facie* that is the place where those transactions ought to be investigated. They had better be investigated at Swansea, and also according to Rule 126 that is the place where they ought to be investigated. I have no hesitation in saying that the bulk of the debtor's legitimate business was carried on at Swansea. Now ought we to interfere with a petition duly presented at Swansea because a

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receiving order has been made in London? It is necessary to consider what has been done, and whether under section 107 of the Bankruptcy Act, 1883, the petitioning creditor has proceeded with due diligence. It is impossible to say so in this case. The petition was presented on February 19th, 1885. No notice of it was given to the creditors at Swansea. It was adjourned from time to time until the petitioning creditor heard from the debtor that another petition had been presented at Swansea. For several months the creditors were allowed to go on trusting the debtor in Swansea in ignorance of the petition. Then the petitioning creditor comes suddenly to the Court here and gets a receiving order. If under all the circumstances such a receiving order were to stand it would be encouraging petitioning creditors to make use of the Bankruptcy Act for their own ends and not for the benefit of the creditors. In my opinion our proper course is not to interfere, and to let an application be made to the London Court to stay the proceedings there.

GRANTHAM, J. :

I am of the same opinion. There may be a little difficulty as to the terms on which the proceedings in London shall be stayed, but it is quite clear to me that Wales is the place where these transactions should be investigated. Looking at the delay from February, 1885, to January, 1886, we can only say that such delay was entirely of a personal nature, and ought not to prevent us, but rather to induce us to try to give another creditor the conduct of the proceedings. The appeal must, therefore, be dismissed with costs.

*F. C. Willis :*

Will your lordships give leave to appeal if it should be considered advisable to do so?

CAVE, J. : No, we shall not give leave.

*Appeal dismissed with costs.*

Solicitors : *A. Jones* for Mr. Martin.

*R. White* for Messrs. Meager, Watson & Co.

Case referred to :—

*In re Brightmore, Ex parte May*, see *ante*, Volume I., p. 253 ;  
L. R. 14 Q. B. D. 37.

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*April 3rd.*

On this day the above case was mentioned before Mr. Justice CAVE, when the London proceedings were ordered to be transferred to the Swansea County Court.

## PRACTICE.

IN RE IVES, EX PARTE ADDINGTON.

*Bankruptcy Act*, 1883, section 103, sub-section (4).

*Debtors Act*, 1869, section 5.

*County Court Orders*, 1875, Order XIX., Rule 9.

BEFORE  
MR. JUSTICE  
CAVE.  
1886.  
March 4th.

*Order of High Court for Payment of Costs—Judgment Debtor's Summons—Power of County Court to order Payment by Instalments.*

The plaintiff in an action in the Queen's Bench Division of the High Court of Justice obtained an order against the defendant for the payment of certain costs.

Subsequently, on the application of the plaintiff, a judgment summons under the Debtors Act, 1869, was issued out of the Brentford County Court asking for an order for the payment by instalments of the sum due.

The County Court Judge refused to make the order, on the ground that he had no jurisdiction to interfere with the order of a Superior Court for payment of a larger sum.

*Held*: (1) That the County Court, not being a Court within the London Bankruptcy District, had power to enforce such an order or judgment of the High Court by directing payment thereof by instalments.

(2) But the County Court would have no power to vary or rescind an order made by the Superior Court for the payment by instalments of a judgment debt, as in such a case the Superior Court would have already dealt with the question of the debtor's means.

The case of *Washer v. Elliott* (1 C. P. D. 169 ; 45 L. J. C. P. 144 ; 34 L. T. 756 ; 24 W. R. 432) explained.

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THIS case raised an important question as to the power of judges of County Courts to make orders under the Debtors Act, 1869, for enforcing judgments of the High Court.

On April 14th, 1885, the plaintiff in an action of *Addington v. Ives* in the Queen's Bench Division of the High Court of Justice obtained an order against the defendant for the payment of certain costs which were taxed at 11*l.* 11*s.* 10*d.*

Subsequently on the application of the plaintiff a judgment summons under the Debtors Act, 1869, was issued out of the Brentford County Court asking for an order for the payment by instalments of the above-mentioned sum.

The County Court Judge, however, refused to make an order for payment by instalments on the ground that he had no jurisdiction to interfere with the order of a Superior Court for payment of a larger sum.

A summons was in consequence taken out by the judgment creditor before Mr. Justice CAVE sitting in Chambers in Bankruptcy, not by way of appeal, but in the exercise of his concurrent jurisdiction to make the order.

*Mr. Sherrard* (solicitor) for the judgment creditor.

The judgment debtor appeared in person.

CAVE, J. :

Judgment.

This case raises a question of some importance as to the power of Judges of County Courts to make orders under the Debtors Act, 1869, for enforcing judgments of the High Court of Justice.

On the 14th of April, 1885, the plaintiff obtained an order against the defendant in the Queen's Bench Division of the High Court of Justice for the payment of certain costs which were taxed at 11*l.* 11*s.* 10*d.* Subsequently on the application of the plaintiff a judgment summons under the Debtors Act, 1869, was issued out of the Brentford County Court, but on the hearing of the summons the learned judge declined to make an order for payment by instalments on the ground that he had no jurisdiction to interfere with the order of a superior court for payment of a larger sum. I am informed that other learned judges, besides the judge of the

Brentford County Court, entertain doubts as to their jurisdiction in these cases, although one of them—the learned judge of the County Court at Margate—has since, on further consideration, altered his views on the subject. For these reasons I thought it better to put my opinion into writing:—

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Section 5 of the Debtors Act, 1869, provides that, subject to the provisions thereafter mentioned, and to the prescribed rules, any Court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent court: provided (1.) That the jurisdiction by this section given of committing a person to prison shall, in the case of any Court other than the superior courts of law and equity, be exercised only subject to the following restrictions; that is to say (a) Be exercised only by a judge or his deputy, and by an order made in open Court and showing on its face the ground on which it is issued; (b) Be exercised only as respects a judgment of a superior court of law or equity when such judgment does not exceed fifty pounds, exclusive of costs; (c) Be exercised only as respects a judgment of a County Court by a County Court judge or his deputy. (2.) That such jurisdiction shall only be exercised where it is proved to the satisfaction of the Court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects to pay the same.

This section gives any Court (which includes a County Court) power to enforce by committal a judgment or order of any competent Court with the proviso, that when the judgment is that of a superior Court, the jurisdiction is to be exercised only when the judgment does not exceed 50*l.*, exclusive of costs. A subsequent part of the section enables any Court (which again must include a County Court) to direct any debt due in pursuance of any order or judgment of that or *any other* competent Court (including, therefore, an order or judgment of the High Court), to be paid by instalments.

The rules are equally clear on the subject. By Order XIX., rule 9, where a party desires to enforce by commitment in any County Court a judgment of any competent Court, he shall obtain from

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such Court an office copy of the judgment he desires so to enforce, and shall file such office copy together with an affidavit of the sum then due thereon with the registrar of the Court of the district in which the party against whom the same is to be enforced resides or carries on business, who shall thereupon issue a judgment summons.

Form 235 is a form of summons for non-payment of a judgment or order of a High Court.

Form 40 is a form of order directing the amount due on a judgment of the High Court to be paid by instalments.

The Bankruptcy Act of 1883, section 103, sub-section (4), enacts that every County Court, within the jurisdiction of which a judgment debtor is or resides, shall have jurisdiction under section 5 of the Debtors Act, 1869, although the amount of the judgment debt may exceed 50*l*.

It appears to me that these enactments give a County Court power to enforce the order or judgment of the High Court by directing payment thereof by instalments, and to commit the debtor in case of nonpayment of the instalments.

Only one other point remains, namely, whether an order for payment of costs is a debt due in pursuance of any order or judgment of the Court, but this question was settled in the affirmative in the case of *Hewitson v. Sherwin* (L. R. 10 Eq. 53 ; 22 L. T. 576 ; 18 W. R. 802).

It may be asked, how in the face of these enactments it could ever have been supposed that the County Court had no jurisdiction to make an order directing payment by instalments of the amount due under a judgment or order of the High Court. The authority cited in support of the contention that the County Court has no jurisdiction is *Washer v. Elliott* (1 C. P. D. 176), where it was held that the power given to inferior Courts by the Act to rescind or vary orders does not enable an inferior Court to rescind or vary an order of a superior Court for payment of a judgment by instalments. The passages in Pollock and Nicoll and Pitt Lewis's books on County Court practice are visibly founded on *Washer v. Elliott*.

The words of the section are "Any Court may direct any debt due from any person in pursuance of any order or judgment of that or any other competent Court, to be paid by instalments, and may



from time to time rescind or vary such order." The words "such order" obviously refer to the order of the Court directing payment by instalments. The County Court, therefore, may order payment by instalments of the amount due on an order or judgment of the High Court, and may rescind or vary its own order; but when the High Court has itself directed payment by instalments of its own judgment, the County Court has no power to vary *that* order. This is all that was decided by the judgment in *Washer v. Elliott*. The judgment in that case proceeds on the extravagance of a construction which would have enabled an inferior Court to rescind or vary the order of a superior Court for the payment of a judgment by instalments, and so make the inferior Court a Court of Appeal over the superior Court. The inconvenience of an inferior Court rescinding or varying an order of a superior Court for payment by instalments is obvious. In making the order for payment by instalments the superior Court has had before it the question of the debtor's means, and it would be highly inconvenient that the inferior Court on the same or even on different evidence as to the debtor's means should set aside or vary the order of the superior Court. But when the superior Court has simply made an order for the payment of costs, or given a judgment for the payment of a sum of money, it has not in any sense had before it the question of the debtor's means, or his ability to pay forthwith or only by instalments, and when the County Court makes an order for payment by instalments in such a case, it does not in the slightest degree rescind or vary the order of the superior Court, but simply follows the direction of section 5 of the Debtors Act. *Washer v. Elliott* is, in truth, no authority for the position taken up by the learned Judge of the Brentford County Court, and the Act to my mind clearly gives the County Court jurisdiction. Any other construction would involve intolerable expense and annoyance. Take the case of an order of the High Court made by the district registrar of Newcastle for the payment of some interlocutory costs taxed at 5*l*. If the debtor's only means consisted of a salary of so moderate an amount that he could only pay by monthly instalments of say 1*l*., the debtor would have to be brought up to London for examination as to his means, if the Judge of the County Court had no jurisdiction.

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Another difficulty which has been suggested is that there is no provision for suspending the right of issuing a writ of execution when an order for payment by instalments is made by a County Court on the judgment of the High Court. This argument is, however, rather specious than practical. In practice application is only made for payment by instalments when the ordinary methods of execution are unavailable or unproductive, and if execution should be levied after the making of an order for payment by instalments—a very unlikely occurrence—the County Court could refuse to enforce the order. A similar difficulty, if real, would affect the High Court as well as the County Court; for an order of the High Court to pay by instalments does not take away the right to levy execution. The remedy, if one should be needed, which has not as yet been found to be the case, would be to make a general rule forbidding the issue or levying of execution after an order for payment by instalments has been made.

In this case the debtor had agreed to pay the debt by instalments of 1*l.* a month, and the learned judge should have made an order accordingly. As, however, he refused to do so, a summons was taken out before me, not by way of appeal, but in order that I might exercise the concurrent jurisdiction which I undoubtedly possess. When, however, the sum due and the amount the debtor is able to pay monthly are so small as they are in this case, it is my practice to refer the parties to the County Court; because the cost of enforcing in the High Court an order for the payment of a monthly instalment of 1*l.* would amount to very nearly three times the amount of the instalment. In this case, moreover, the debtor does not reside within the London Bankruptcy District; and if I were to make this order, and the debtor were to fail to comply with it, he would be dragged up from Brentford to the Royal Courts of Justice, to undergo an examination as to his means which could be made more cheaply and more efficiently at Brentford where he resides and is known. I regret very much the trouble to which the creditor has been put; but I think the most convenient course will be to dismiss the present application, and to direct the creditor to renew his application to the County Court, when I have no doubt the learned judge will make the

order for payment by monthly instalments of 1*l.* to which the parties have agreed.

In the second case the facts are similar to the first, except that the original order was an order of the High Court in Bankruptcy of the 19th of August, 1885, dismissing *Addington's* petition for adjudication against *Ives*, and ordering by consent that *Ives* should pay *Addington* the sum of 25*l.*, the agreed costs on or before the 19th of September, 1885.

The only effect of this order which was made by consent is to give *Ives* a month before any steps could be taken to enforce payment of the costs. The Court had not before it any question as to the defendant's means, nor did it pronounce any decision thereon. Practically the order was held in suspense for a month; but when the month came to an end the order became a simple unconditional order to pay forthwith.

In this case also the debtor consented to an order for payment by instalments of 1*l.* a month, and I must adopt the same course as in the other case, and I have no doubt that a renewed application to the Brentford Court will be successful.

*Application dismissed. The judgment creditor to renew his application to the County Court.*

Cases referred to and explained:—

*Hewitson v. Sherwin*, L. R. 10 Eq. 53; 22 L. T. 576; 18 W. R. 802.

*Washer v. Elliott*, 1 C. P. D. 169; 45 L. J. C. P. 144; 34 L. T. 756; 24 W. R. 432.

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COURT OF  
APPEAL  
BEFORE THE  
MASTER OF  
THE ROLLS,  
LINDLEY, L.J.,  
LOPES, L.J.,  
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March 26th  
and 27th.

IN RE REED, BOWEN, & CO., EX PARTE REED, BOWEN,  
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*Bankruptcy Act, 1883, Section 18.*

*Scheme of Arrangement—Approval of Court—Discretion of Registrar—Wishes of  
Creditors—Costs of Official Receiver.*

*Held:* (1) That the action of the legislature by section 18 of the Bankruptcy Act, 1883, in taking away from the majority of creditors the power which they formerly possessed, and in putting into the hands of the Court the controlling power in the case of a composition or scheme of arrangement, was for the purpose of protecting such creditors themselves against their own recklessness: for preventing a majority of creditors from dealing recklessly not only with their own property but with that of the minority of creditors: and for the purpose of enforcing, so far as the legislature could, a more careful and moral conduct on the part of persons who eventually become insolvent debtors.

(2) That in deciding as to the granting or refusing the approval of the Court to a composition or scheme of arrangement, the question whether the debtor has kept proper books is one of primary importance: and that the neglect of a trader to have books properly kept and balanced from time to time, so that the real state of his affairs may at once appear, is a serious offence.

(3) That where, by the provisions of the proposed scheme, the control of the business is left in the hands of the debtors who have been proved to have previously carried on their business in a reckless and improper manner, the Court ought to refuse its approval to such scheme, on the ground that it would not trust with the control of the business persons who had shown themselves unworthy to be trusted to carry on any business with reasonable care and attention.

(4) That when the official receiver has made his report upon a composition or scheme of arrangement his duty is complete, and, except under very particular circumstances, he should not appear on an appeal: that if the appearance of the official receiver is essential, the Court will allow the appeal to stand over for that purpose: and that unless his appearance is requisite no costs will be allowed to him.

THIS was an appeal from a decision of Mr. Registrar Hazlitt refusing to approve a scheme of arrangement of the affairs of the debtors which had been accepted by the creditors under section 18 of the Bankruptcy Act, 1883.

Sub-section (5) of section 18 provides that "The Court shall, before approving a composition or scheme, hear a report of the

official receiver as to the terms of the composition or scheme, and as to the conduct of the debtor, and any objections which may be made by or on behalf of any creditor."

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And by sub-section (6), "If the Court is of opinion that the terms of the composition or scheme are not reasonable, or are not calculated to benefit the general body of creditors, or in any case in which the Court is required under this Act where the debtor is adjudged bankrupt to refuse his discharge, the Court shall, or if any such facts are proved as would under this Act justify the Court in refusing, qualifying, or suspending the debtor's discharge (*see Bankruptcy Act, 1883, section 28, subsections (2) and (3)*), the Court may, in its discretion, refuse to approve the composition or scheme."

On April 17th, 1885, a receiving order upon a creditor's petition was made against the debtors, *Reed, Bowen, & Co.*, who carried on business as contractors, and were engaged in the construction of railway and other works in Brazil and elsewhere.

Twenty-four bankruptcy petitions had been presented against the debtors since July, 1883, and in the year 1884 the furniture of the debtor *Reed* was seized and sold under an execution.

In the statement of affairs the estimate of their joint liabilities was set down by the debtors at 152,488*l.*, and the joint assets at 22,067*l.* Each of the debtors estimated his separate assets at *nil*.

The scheme of arrangement in question, together with the report of the official receiver thereon, was as follows:—

"Report to the Court on the application for approval of a scheme of arrangement.

The official receiver in the above matter hereby reports to the Court—that the receiving order herein was made on a creditor's petition on the 17th day of April, 1885.

That the debtor submitted an amended statement of and in relation to their joint affairs on the 4th day of November, 1885.

That the liabilities expected by the debtor to rank against their estate appear by the said statement to amount to 152,488*l.* 4*s.* 7*d.*

That the assets appearing by the same statement as available for the payment of unsecured creditors after deducting the claims of

1886. preferential creditors were estimated by the debtors to produce  
 22,067*l.* 13*s.* 4*d.*  
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 REED, BOWEN & Co., That the debtor, *J. L. Reed*, has filed a statement of affairs of  
 EX PARTE his separate estate, showing liabilities unsecured 317*l.* 13*s.* 6*d.*,  
 REED, BOWEN & Co. assets, *nil*.

That the debtor, *E. C. Bowen*, has also filed a statement of his separate estate, which shows as follows :—Liabilities not expected to rank 1051*l.*, assets, *nil*.

That, at the first meeting of creditors duly summoned, and held on the 2nd day of September, 1885, a special resolution was passed by the creditors entertaining the following proposal by the debtors, viz. :—

1. That all the property of the debtors, joint as well as separate, divisible amongst their creditors, vest in a trustee, for the benefit of their creditors ; but if the debtors shall have entered into any contracts which the trustee and committee of inspection consider should not be assigned, but be held in trust by the debtors or either of them, for the benefit of the creditors, then that the same shall not be assigned, but the debtors, or such one of them as may be necessary, shall execute a declaration of trust, in proper form, for the benefit of the creditors or for the trustee on their behalf, in respect of such contracts, and that subject to these resolutions, the said property of the debtors shall as nearly as may be, be administered by the said trustee, under the control of a committee of inspection, according to the law of bankruptcy, and particularly Part III. of the Bankruptcy Act, 1883.

2. That there shall be a committee of inspection for the purpose of superintending the administration and realisation of the debtors' property by the trustee, and that the provisions of the Bankruptcy Act, 1883, relating to committees of inspection, do in so far as applicable, apply to such committee.

3. That the debtors shall assist in every possible way in the administration and realisation of their property, and the distribution of the proceeds amongst their creditors.

4. That the trustee may make an allowance to the debtors of a percentage on all sums received by him, at such a rate as the committee of inspection shall fix.

5. That all debts directed by the Bankruptcy Act, 1883, to be paid in priority to other debts, shall be so paid.

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6. That all costs, charges, and expenses (including those of the debtors' solicitors) of and incidental to the proceedings in this matter, and to the suspension of payment by the debtors, and the investigation of their affairs, and of this and the subsequent meetings of their creditors, and generally in relation to the affairs of the debtors, and the preparation of the scheme of arrangement, and the obtaining the approval of the Court thereto, shall be taxed and paid by the trustee.

7. That the costs, fees, and charges of the official receiver, if any, shall be retained by him out of any monies in his hands, or shall be paid by the trustee (if such money be insufficient for that purpose) out of any monies received by him as such trustee.

8. That, with a view of paying in full the debts provable under those proceedings, each of the debtors will set apart in each year, for a period of three years from the date of the confirmation of this scheme by the Court, for the benefit of the creditors, one-third part of his net annual earnings realised, until the creditors shall receive payment in full of the debts due to them respectively, and the trustee shall distribute the same amongst the creditors, in the shape of dividends, in the same manner as if the same had been realised from the property assigned. The trustee shall have a right to audit the books of the debtors and each of them, half yearly, until all the creditors shall have received payment in full of their respective debts, but he shall not at any other time or in any other way control, molest, or interfere with either of the debtors, or any business either of them may undertake or transact. That in the event of any securities, cash, or other assets remaining with the trustee, after payment in full of all the debts due to the creditors, the surplus so remaining shall belong to and be paid over or transferred to the debtors.

It was further resolved :—

1. That *E. Goldsworthy James*, Chartered Accountant, of No. 27, Chancery Lane, London, be appointed trustee under the scheme to administer the debtors' property, joint as well as separate.

2. That there be a committee of inspection, and that *Charles Douglas Fox*, Civil Engineer (of *Messrs. Charles Fox & Sons*), of

1886. 1, Victoria Mansions, Westminster, *Fenelon Alcoforado*, Brazilian  
 IN RE Advocate, of 35, Piccadilly, and *Henry Ramsay Taylor*, of 5,  
 REED, BOWEN, Furnival's Inn, solicitor, be the members of such committee.  
 & Co.,  
 EX PARTE 8. That the trustee's remuneration shall be determined by the  
 REED, BOWEN, committee.  
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4. That the trustee do give such security as the Board of Trade may require.

The public examination of the debtor was concluded on the 6th day of November, 1885.

That at a subsequent meeting of creditors duly summoned and held on the 8th day of January, 1886, the aforesaid scheme of arrangement was confirmed by the statutory majority of the creditors.

That the gross amount of the assets is 22,353*l.* as estimated by the debtors in their statement of affairs.

And, having regard to section 18, sub-sections 5 & 6, the official receiver reports :—

That the debtors are contractors, that the debtor *John Langham Reed* states that from 1867 to 1874 he carried on business in his own name and alone, and from 1874 to 1878 under the name of *Reed Bros.* or *Reed Bros. & Co.* in conjunction with his brother, who, however, was only a salaried partner, that in 1879 the present firm of *Reed, Bowen & Co.* was formed, their capital consisting of railway bonds of the value of 82,500*l.* which apparently subsequently realized 49,646*l.*

The debtor *Charles Edwd. Bowen* was at that time, and has since been carrying on business in Canada as a partner in the firm of *Bowen & Woodward*, which partnership was dissolved by effluxion of time in September last.

The above-mentioned firm of *Reed Bros. & Co.* also carried on business after the formation of the firm of *Reed, Bowen & Co.*, and in fact accepted bills for the firm of *Bowen & Woodward* as late as April, 1883.

That the books of account produced by the debtors are very imperfect. There are no expenses accounts, or accounts of the partners' drawings; and although it is possible that the items of these accounts are recorded in the cash-books produced, yet, by



reason that the entries in the cash-books have not been posted, such items cannot be ascertained without great difficulty.

No ledger has been produced nor any accounts showing the sums owing to the creditors named in the statement of affairs. No book containing any capital account has been produced, the only document purporting to be an account is a sheet of paper showing the sum of 49,646*l.* 1*s.* 7*d.* as the amount realised from the nominal capital of 82,500*l.* as herein before mentioned, but there is no account of the manner of disposal of the said sum. That it appears from the securities-book produced that in July, 1884, the debtors were possessed of 19,900*l.*, Sherbrook Mining Company Bonds, and of 10,000*l.* (\$50,000) Utica and Ithaca Railway certificates, making together property of the nominal value of 29,900*l.*

These securities are not mentioned or referred to in the debtors' statement of affairs, and there is no account whatever in the debtors' books of the way in which such securities have been disposed of. The official receiver therefore reports that the books of accounts produced by the debtors, do not sufficiently disclose their business transactions and financial position within the three years preceding the date of the receiving order.

That the debtors have for some time past been in financial difficulties.

The debtor *John Langham Reed* stated in the public examination that during the last three years the firm had not been able to conduct their business so as to provide any profit, and in June or July, 1884 (as appears from the preliminary examination of the said *John Langham Reed*) the debtors' furniture was seized and sold under an execution. Nevertheless the debtors continued to carry on business and contracted debts, amongst others a sum of 1,773*l.* for salaries and wages up to the date of the receiving-order. The official receiver therefore reports that the debtors continued to carry on business after knowing themselves to be insolvent.

That the assets which will vest in the trustee under the proposed scheme of arrangement consist wholly of a surplus from a security in the hands of a secured creditor, namely an estate in North Brazil valued by the debtors at 52,353*l.* and mortgaged for 30,000*l.* ; that, as admitted by the said *John Langham Reed* in his public examination, there are no available assets whatever at the present

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moment; that, so far as regards the contracts upon which the debtors rely to discharge their liabilities, it is stated in the public examination that it is uncertain how the same will turn out. That, in the face of the facts that 24 petitions in bankruptcy have been presented against the firm since July, 1883, and the debtors' furniture has been seized and sold as aforesaid, it does not appear how the debtors will be in a position to carry out the said contracts; that there is no undertaking on the part of the secured creditors that they will refrain from realizing the securities as soon as favourable opportunity may arise, nor any evidence of the present or probable future value of the same securities.

The official receiver further reports that there is no evidence whatever to show the probable amount of the net earnings of which the debtors' propose to set apart one third part for their creditors during the next three years, nor any evidence that any sum will be earned by them or either of them. Under these circumstances the official receiver is unable to report that the creditors will receive any dividend whatever from that proposal, nor is he able to report that the said scheme of arrangement is reasonable and calculated to benefit the general body of creditors.

That, save as aforesaid, the official receiver is not in possession of any evidence tending to prove that the debtors or either of them have or has committed any misdemeanour under the Bankruptcy Act, 1883, or Part II. of the Debtors Act, 1869, or any amendment thereof, or tending to prove any of the facts mentioned in section 28, sub-section 3, of the Bankruptcy Act, 1883.

Dated this 4th day of February, 1886."

The learned registrar, in refusing to approve the scheme, delivered the following judgment:—

"This is an application under section 18 for the confirmation by the Court of a scheme of arrangement. I need not on this occasion enter upon the various charges reported by the official receiver in opposition to the scheme. They are charges which, if substantiated, would assuredly manifest the bankrupts serious offenders within section 28; and I am quite satisfied that it would be equally against public morality and commercial policy, and inconsistent with the whole spirit of the statute in relation to these schemes, that section 18 should be utilised by bankrupts as a

means of escape from just punishment within section 28. In other words schemes of arrangement must not be permitted to operate for buying off a prosecution; even if the amount of the composition be fairly reasonable and the security clear and creditors friendly, the principle is the same. In this case composition and security would appear to be equally and altogether hazy. I refuse the application."

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From this decision the debtors now appealed, and another appeal was also presented by some of the creditors.

The official receiver was served by the debtors with notice of appeal, but such notice stated that he was served for conformity only, no relief being asked against him, and that if he appeared his costs of appearing would be objected to.

*Winslow, Q.C.* (*Herbert Reed* with him) for the debtors.

*E. Cooper Willis, Q.C.*, for the second appeal.

*Bigham, Q.C.*, *R. V. Williams*, and *Rubie* for other approving creditors.

*Winslow, Q.C.*:

The registrar ought to exercise his discretion with a regard to the interests of the creditors. The creditors are business men and are, therefore, the best judges of their own interests. The scheme is the only chance which the creditors have of receiving any dividend. If there is a bankruptcy the contracts which are valuable will be forfeited, and the creditors will get nothing.

*Yate Lee* and *Sidney Woolf*, for creditors who opposed the scheme, and *Muir Mackenzie* (*Arnold White* with him) for the official receiver, were not called upon.

*March 27th.*

THE MASTER OF THE ROLLS (LORD ESHER):

Much has been said about the opinion of a large majority of Judgment. creditors in this case, and the argument has been to my mind the

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same as if the provisions of this Bankruptcy Act, which is now before us, had never been passed at all. It is an old argument that the Court ought to trust to the majority of creditors as men of business to know what is best for themselves. Now, in my opinion, this Act of Parliament was passed because it had been proved to the satisfaction of the Legislature that a majority of creditors, however large, was not careful and was not to be trusted; on the contrary, was careless. That they practically dealt with bankruptcies to this effect, that they in their own judgments wrote off the debts as utterly bad, but that they agreed to terms which might give some possibility, but an evanescent chance, of their getting something out of the wreck; and it was because of the knowledge and proved behaviour of creditors with regard to insolvent debtors that this Act of Parliament was passed which takes away from the majority of creditors that power which they had so recklessly and carelessly used, and put the controlling power into the hands of the Court for the purpose of protecting themselves against their own recklessness; for preventing a majority of creditors from thus dealing so recklessly, not only with their own property, but with that of the minority of creditors, and for the purpose of enforcing, so far as the Legislature could, a more careful and moral conduct on the part of persons who eventually become insolvent debtors. This being the object of the Act of Parliament, we must see what means they took to carry that into effect. The first thing is that they appointed an official receiver, and gave him the power to make a report, and gave to his report this enormous effect, that his report should be *prima facie* evidence of the truth of the facts contained in it. Now that is giving him immense powers, and for what purpose? In order that the Court might not be forced, as it had been before, to rely upon the view of that majority of creditors which is so much relied upon in the argument before us. Those powers were given to the official receiver in order to protect the Court from the very argument which has been so much insisted upon before us to-day.

Now then, further, in order to carry out the view of the Legislature as against this reckless conduct of creditors, the Legislature has imposed on the Court a duty, which is, that where the creditors have agreed to a scheme (so that the first assumption is

that the creditors or a great majority of them have agreed) it shall not be sufficient thus to come before the Court, and say, "I represent so many, I represent so many, and I represent so many more, and therefore you ought to adopt the scheme." That is the very thing which this Act of Parliament says the Court shall not do, and it is not that the creditors are to be satisfied with the scheme; it is that the Court is to be satisfied with the scheme, notwithstanding the agreement of the majority of the creditors.

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Now how is the Court to exercise this jurisdiction? If the Court is of opinion that the terms of the scheme are not reasonable, then the Court shall refuse to confirm it; or if the terms of the scheme are not calculated to benefit, not the creditors who have agreed to them, but the general body of creditors, then the Court shall refuse to confirm the scheme, although it has been agreed to; and although the scheme has been agreed to, and although the terms of the composition might be reasonable, so far as the creditors are concerned, and although the terms of the scheme might be calculated to benefit the general body of creditors, yet for the guarding of the morality of trade, if the case be such that the Court would be required where the debtor is adjudged bankrupt, to refuse his discharge (now this is conduct, mind, of the debtor), although the scheme proposed might be calculated to benefit the creditors; nevertheless, if his conduct has been such, the Court shall refuse to confirm.

Now you come to another point which is still, for this purpose, not for the benefit of the creditors after the insolvency, but in order to protect the morality of trade, and to force persons to be moral and to trade properly. If any such facts are proved as would under the Act justify the Court in refusing (this is pretty well the same as the other) the qualifying or the suspending of the debtor's discharge, the Court may, in its discretion, do what? Not impose new terms, but may refuse to approve the scheme. The Court is not to adopt the scheme, or confirm it and put other fetters on. If the conduct of the debtor has been such as, if there were no scheme, it would justify the Court in suspending the debtor's discharge, then the Court may, in its discretion, confirm the scheme certainly; but, if it does not confirm the scheme, it may

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refuse to approve the scheme. Now see what is the state of facts to which that law is to be applied here. Here is a scheme proposed. Whether that scheme is reasonable must depend partly on the facts to which it is to be applied. What are they? The facts to which this scheme is to be applied are that these debtors, before their bankruptcy, had entered into certain contracts, and had obtained certain concessions for Governments in South America—large contracts; onerous contracts, for the purpose of performance—large contracts; probably, if successful, bringing in large profits. But, having accepted these contracts, misfortunes have happened, and what has been the result of those misfortunes—that it has brought these contractors into this condition, that twenty-three bankruptcy petitions had been presented against them. Any more strong evidence of the difficulties in which they were cannot be well conceived; and judgment having been obtained against one of them, or against the firm, it signifies not which, their position was so desperate that the judgment, whatever was its amount, could not be paid out, and the actual furniture of their houses had been seized. There were large contracts in America which must require large expenditure in order to fulfil them; which must require large capital on hand in order to carry them on with success, and, instead of having that capital, the debtors are reduced to a position so bad that it is impossible for any man of business to conceive that they have either means or credit. It was suggested, on account of the goodness of the contracts in Brazil, that they could raise money in London. One naturally asks—Is there anybody who will come before the Court, and not give a shadowy opinion that in the City of London these persons could get credit? But is there anybody who will pledge his oath that he himself is ready to advance them money? Certainly not. Therefore the facts disclose this, that there are these large contracts, but that the contractors have no means to carry them out; neither means in hand, nor means in credit, either here or elsewhere. Then what is the scheme? Apply the scheme to this state of facts. They are to be allowed to carry out these contracts. If this scheme is passed they are immediately made masters of the mode of carrying out these contracts, and then what they offer is that they will set by a certain amount each

year of the net profits of those contracts. What does the official receiver say, by way of argument, of course? The official receiver says there is no evidence whatever to show the probable amount of the net earnings—there is none—of which the debtors propose to set apart one third part for their creditors during the next three years. There is no evidence of that, nor any evidence that any sum will be earned during the next three years by them, or either of them. There really is none. There is not a tittle of evidence to show it. On the contrary, the business inference will be that, even if they could carry on the contracts, the first three years of it will be onerous to them, and there will not be any net profits at all. Under these circumstances the official receiver is unable to report that the creditors will receive any dividend whatever from the proposal. It seems to me that that objection of his is a good one, and I cannot see any reasonable prospect of it. “Nor is he able to report that the said scheme of arrangement is reasonable, or calculated to benefit the general body of creditors.” Now this last part is to my mind wholly a submission to the Court. Now taking these facts into consideration, that this scheme is one that is to hand over, or to leave rather, in the hands of these creditors the obligation, and the power, and the sole control of the mode in which these burdensome contracts are to be carried out; considering their condition and their means, and what they must require to carry out those contracts, is the Court of opinion that the terms of this scheme are reasonable? To my mind they are wholly unreasonable. They give nothing to the creditors, except, as I say, this desperate chance, which the creditors only adopt because they think, if we do not adopt this we must wipe off this debt at once. It is a mere desperate chance, without really any hope, that they will get something if this is allowed to go on; but every probability being that, if they were to attempt to go on with these contracts, they would fail more and more; and if they got any money with which to go on they would only have other creditors who would suffer in the same way that these creditors are now suffering. To my mind, therefore, this scheme is not reasonable.

If it is not a reasonable scheme it certainly is not one calculated to benefit the general body of creditors. That is affirmative.

1886.  
IN RE  
REED, BOWEN,  
& Co.,  
EX PARTE  
REED, BOWEN,  
& Co.

1886.

IN RE

REED, BOWEN,  
& Co.,

EX PARTE

REED, BOWEN,  
& Co.

What is there to show that any benefit will come to the creditors ?

As I say, I agree with the official receiver that there is no prospect of anything coming to the creditors by means of allowing these things to go on, or any reasonable prospect of it. Therefore it is not calculated to benefit the general body of the creditors. If so you see either of those views upholds the decision of the Registrar, and he, being the Court, was right in refusing to confirm this scheme. But supposing that that is carrying the view too far (and I am only assuming it for the purpose of showing there are other grounds), I come to the question of discretion—the discretionary power of the Court. What here again is the state of things ? To my mind it is clearly made out that these contractors traded, as contractors, in the most reckless and careless and improper trading manner, and were guilty of improper conduct as traders. To my mind they have committed that not slight but serious offence against the trading morality which is struck at by the 28th section of this Act ; and that they have seriously failed to keep ordinary books in an ordinary and proper and business way. They have hardly had any books at all. To my mind all the excuses about not having the ordinary books are no excuses at all. The ordinary duty, if they are contractors—and it is the business of contractors to be carrying on contracts at many different places—is, at their head place of business, to have books which will show them, not the result of each contract, but the result of all their contracts. There is not a symptom of their having ever had such a ledger, or beginning such a ledger. There is nothing which could show them what was the state of their business with regard to all their contracts in any book. It is not enough that there should be books, with entries in those books which would take an accountant an interminable time to make them up. That is not keeping books. They must have been properly kept and balanced from time to time, so that at any time the real state of the trader's affairs may not appear by a long enquiry, but may at once appear. Those are the books that persons ought to keep. There is no evidence, but rather the contrary, that any such books have been kept here, and this is not, as has been suggested, a slight offence. It is a serious offence.

Now again, did they carry on business after they knew they



were insolvent? \* \* \* They were insolvent, and they knew that they were insolvent, and I again say it is a serious offence to carry on after that. Taking it altogether, because you must not take one thing alone, is that the conduct of good and careful and proper traders? They have been guilty of offences under the 28th section (and there is this one more point), those offences are such as are strong to show that even if the scheme were passed, they are not persons who ought to be trusted in the way in which the scheme would trust them to carry on business. Those who have carried on business in such a reckless and improper manner before, are not persons who ought to be trusted by a scheme to carry on the business under only the flimsy control which is attempted to be put over them by this scheme. Therefore, here, not only are there offences proved which would justify the Registrar in refusing to confirm this on account of the offences, but it goes further, and it shows that the Court ought to refuse the scheme on this ground—that this scheme would trust with the control of the business persons who had shown themselves utterly unworthy to be trusted to carry on any business with reasonable care and attention. It seems to me, therefore, upon every ground, that the Court ought to exercise the power given to it by the statute, and is bound to say that this scheme ought not to be confirmed. The appeal must be dismissed.

1886.  
IN RE  
REED, BOWEN,  
& Co.,  
EX PARTE  
REED, BOWEN,  
& Co.

LINDLEY, L.J., and LOPES, L.J., concurred.

*Arnold White.*—My Lords, I ask for the costs of the official receiver.

[THE MASTER OF THE ROLLS: There is a difficulty. Why did you come?]

Because we were served with notice of motion. The report of the official receiver was impeached, so that it was necessary for him to be here to defend it.

[THE MASTER OF THE ROLLS: The official receiver has done his duty when he has made his report. He need not defend his report.]

1886.  
 IN RE  
 REED, BOWEN,  
 & Co.,  
 EX PARTE  
 REED, BOWEN,  
 & Co.

[LINDLEY, L.J. : Serving is one thing, but I do not think we have wanted you; and if you had been wanted we should have allowed the appeal to stand over until you came. We should have adjourned the appeal until you came.]

I submit to your lordships that I am entitled to costs.

THE MASTER OF THE ROLLS :

The Court has before this stated that it will not encourage the appearance of anybody whose costs are to be paid out of an estate. With regard to the official receiver, he is an officer of the Court of Bankruptcy, and when he has made his report, his duty is complete, and as a general rule (and I propose to say this with the concurrence of my brothers), on an appeal, the official receiver should not appear. He should not come here unless the Court requires him to come; and if the Court requires him to come, then he will come, and then his costs will be paid. But he must not volunteer to come here. He ought not to come unless there are some very peculiar circumstances indeed, which do not exist in this case. We think his appearance here to-day was not necessary for the information of the Court, and the Court has derived no benefit from his presence. Therefore the ordinary rule must prevail. He ought not to have appeared, and he cannot have his costs.

LINDLEY, L.J. : That appears to me a most important rule.

LOPES, L.J. : I quite agree.

*Appeal dismissed with costs.*

Solicitors : G. S. & H. Brandon for the debtors.

*Ingle, Cooper, and Holmes for the second appeal.*

*Foss and Ledsam for other approving creditors.*

*Lumley & Lumley, Letts Brothers, and G. Castle*  
for opposing creditors.

*W. W. Aldridge* for the official receiver.

1886.  
IN RE  
REED, BOWEN,  
& Co.,  
EX PARTE  
REED, BOWEN,  
& Co.

*April 17th.*

On this day application was made to the Court as follows :—

*Bigham, Q.C.* : I am instructed to ask your lordships for leave to appeal to the House of Lords in this case.

THE MASTER OF THE ROLLS :

We shall not give you leave. There is no great principle of bankruptcy law involved.

*Leave to appeal refused.*

## PRACTICE.

IN RE MOON, EX PARTE DAWES.

*Bankruptcy Act, 1883, sections 97 and 104.*

*Bankruptcy Appeals (County Courts) Act, 1884, section 2.*

*Special Case stated by County Court—Right of Appeal from Decision of High Court.*

*Held* : That an appeal lies direct to the Court of Appeal from the decision of the Judge in Bankruptcy upon a Special Case stated under section 97, sub-section (3), of the Bankruptcy Act, 1883, by the Judge of a County Court for the opinion of the High Court.

COURT OF  
APPEAL.  
BEFORE THE  
MASTER OF  
THE ROLLS,  
LINDLEY, L.J.  
and  
LOPES, L.J.  
1886.  
*April 2nd.*

THIS was an appeal on behalf of one *Dawes*, the trustee of a certain deed of assignment executed by the debtor *Moon*, against an order made by Mr. Justice CAVE, on February 22nd last, upon a special case stated by the learned judge of the Salisbury County

1886.  
 {  
 IN RE  
 MOON,  
 EX PARTE  
 DAWES.

Court, under section 97, sub-section (3), of the Bankruptcy Act, 1883, for the opinion of the High Court.

*Rigby, Q.C. (E. Cooper Willis, Q.C., and F. C. Willis, with him), for the appellant.*

*Montague Cookson, Q.C. (Vaughan Williams and Seward Brice with him), for the respondent.*

*Montague Cookson, Q.C.:*

I have a preliminary objection. The appeal is against an order made by Mr. Justice CAVE with regard to the effect of this deed of assignment, on a special case remitted to him by the County Court judge under section 97 of the Bankruptcy Act, 1883. That section provides, in sub-section (3), that "If any question of law arises in any bankruptcy proceeding in a County Court which all the parties to the proceeding desire, or which one of them and the judge of the County Court may desire, to have determined in the first instance in the High Court, the judge shall state the facts, in the form of a special case, for the opinion of the High Court. The special case and the proceedings, or such of them as may be required, shall be transmitted to the High Court for the purposes of the determination." Then section 104 of the Act regulates appeals and provides:—" (2) Orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal as follows:—(a) An appeal shall lie from the order of a County Court to her Majesty's Court of Appeal." That is now altered, as I shall show directly.— " (b) An Appeal shall lie from the order of the High Court to her Majesty's Court of Appeal." The Act 47 Vict. c. 9, known as the Bankruptcy Appeals (County Courts) Act, 1884, makes the alteration I have referred to above, and provides by section (2) that "Section 104, sub-section 2 (a) of the Bankruptcy Act, 1883, is hereby repealed, and instead thereof, it is hereby enacted that an appeal shall lie in bankruptcy matters, at the instance of any person aggrieved, from the order of a County Court to a Divisional Court of the High Court of Justice, of which the judge to whom bankruptcy business shall for the time being be assigned, shall for the purpose of hearing any such appeal be a member. The decision of such Divisional Court upon any such appeal shall be final

and conclusive, unless in any case it shall seem fit to the said Divisional Court, or to the Court of Appeal to give special leave to appeal therefrom to her Majesty's Court of Appeal, whose decision in such case shall be final and conclusive." Now what I say is this. This is an appeal from a special case. When a special case is decided it becomes part of the judgment of the County Court. The High Court advises or directs the County Court. The County Court judge obeys the direction and gives a finding. If that finding is unsatisfactory, an appeal will lie to a Divisional Court in bankruptcy, and then, if leave is given, from that to the Court of Appeal. It is not right to come direct to the Court of Appeal as in this case. An order would be made by the County Court in accordance with the opinion expressed by the High Court, and then by virtue of the Amendment Act of 1884, an appeal from that order would lie to a Divisional Court.

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IN RE  
MOON,  
EX PARTE  
DAWES.

THE MASTER OF THE ROLLS (LORD ESHER):

I am of opinion that there is nothing in this preliminary objection. This is not an appeal from a County Court. The order or judgment was given in the High Court, and then an appeal lies to the Court of Appeal.

LINDLEY, L.J.:

I am of the same opinion. The statute 47 Vict. c. 9, does not touch section 104, sub-section 2 (b), of the Bankruptcy Act, 1883, which provides that "An appeal shall lie from the order of the High Court to Her Majesty's Court of Appeal." This was an order of the High Court.

LOPES, L.J.:

I entirely agree. It is clear that this is not an appeal from the County Court, but from the High Court.

*The appeal, which turned upon the construction of the particular deed, was then heard and dismissed with costs.*

Solicitors: *Dawes & Son*, for the appellant.

*Wade & Lyall*, for the respondent.

## PRACTICE.

COURT OF  
APPEAL  
BEFORE THE  
MASTER OF  
THE ROLLS,  
LINDLEY, L.J.  
LOPEZ, L.J.  
1886.  
April 3rd.

IN RE WINBY, Ex PARTE WINBY.

*Bankruptcy Act, 1883, section 7.*

*Petition by Creditor—Adjournment—Evidence in support of Petition.*

*Held:* That where, upon the hearing of a bankruptcy petition against a debtor, the evidence requisite under section 7, sub-section (2) of the Bankruptcy Act, 1883, is adduced, it is not necessary, in the event of the hearing being adjourned, to give at such adjourned hearing similar evidence under the said sub-section.

THIS was an appeal from an order of Mr. Registrar Finlay Knight, dated March 25th last, and making a receiving order against the debtor *Winby*.

The ground of the appeal was the insufficiency of the evidence on which such receiving order had been made.

*à B. Terrell*, for the debtor *Winby*.

The receiving order was made on insufficient evidence. The petition on which it was made came on for hearing on February 11th last, together with another petition, but was adjourned until the 18th. On the adjournment a consent was taken that no further evidence should be required. On the 18th the other petition was dismissed, and this petition was again adjourned, but on March 25th a receiving order was made upon it on the same evidence as before. Now I contend that under the Act the evidence of the debt must be brought down to the time of the petition.

[THE MASTER OF THE ROLLS: Have you any evidence or any pretence for saying that the debt was paid in the meantime?]

No. But if the debtor gets the benefit of this technical objection he may be able to avoid bankruptcy.

[THE MASTER OF THE ROLLS: You say that in the face of ten petitions against this man.]

Section 7 of the Bankruptcy Act, 1883, provides:—“(1) A creditor’s petition shall be verified by affidavit of the creditor, or of some person on his behalf having knowledge of the facts, and served in the prescribed manner. (2) At the hearing the Court shall require proof of the debt of the petitioning creditor, of the service of the petition, and of the act of bankruptcy, or, if more than one act of bankruptcy is alleged in the petition, of some one of the alleged acts of bankruptcy, and, if satisfied with the proof, may make a receiving order in pursuance of the petition.” The words of the Act are imperative. It is “shall require.” In *Ex parte Dodd, In re Ormston* (L. R. 3 Ch. Div. 352), a creditor filed a petition for adjudication, with the usual affidavit verifying the statements of the petition. The debtor gave notice of his intention to dispute the statements in the petition, and attended at the hearing, but did not tender any evidence. The registrar accordingly made an order of adjudication without further evidence on behalf of the creditor than the affidavit filed with the petition. It was held on appeal that “the statements in the petition ought to have been proved afresh; and that the adjudication must be annulled.” So also in the case of *Ex parte Rogers, In re Rogers* (L. R. 15 Ch. Div. 207), it was held that a debtor’s summons and a bankruptcy petition founded upon the non-compliance with it, were entirely distinct litigations, and the evidence taken upon the one could not be used upon the other unless previous notice had been given of the intention to use it. Therefore, upon the hearing of a bankruptcy petition founded upon the debtor’s non-compliance with a debtor’s summons, the service of the summons must be strictly proved, even though the debtor had in an affidavit previously made by him, upon an application to dismiss the summons, admitted that the summons had been served on him. And the Master of the Rolls, then Lord Justice BRETT, said, “I am sorry to say that the captious objection which has been taken must prevail. It seems to me that Rule 38 renders it necessary that the act of bankruptcy should be proved again on the hearing of the petition, i.e., proved by fresh evidence, which is evidence on that proceeding. It seems to me that the evidence on the former proceeding cannot be used unless something is done to make it evidence on the new proceeding. . . . The objection was really a

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surprise, looking at what had happened previously ; no reasonable person would have expected it to be taken. The appellant had, however, a legal right to take it, and as it is pressed we are bound to allow it." And Lord Justice COTTON said, "It is impossible not to regret that this objection has been taken, because there can be no reasonable doubt that an act of bankruptcy has been committed. But the rule requires that the act of bankruptcy should be proved at the hearing of the petition, and, in my opinion, that has not been done in the present case." (Counsel also referred to the case of *In re Lindsay, Ex parte Lindsay*, L. R. 19 Eq. 52 ; 44 L. J. Bank. 5 ; 31 L. T. 415.)

*Ribton*, for the petitioning creditor, was not called upon.

THE MASTER OF THE ROLLS (LORD ESHER) :

Judgment.

If I had been asked as counsel to argue such a case as this, I must admit I should have felt very much inclined to have refused to do so. The point appears to be this. The case having been brought before the Registrar, and the necessary evidence having been given, the case was postponed. Now it is said that at the postponed hearing evidence must be given again, and in support of that contention three cases are cited which do not touch the point at all. Further than that, in the present case, we find in the consent which was taken the words that no further evidence shall be required. The Registrar was perfectly right in coming to the decision he did, and the appeal must be dismissed with costs.

LINDLEY, L.J. :

I am of the same opinion. After the consent of February 11th, at any rate, this appeal ought never to have been brought.

LOPES, L.J. :

I entirely agree.

*Appeal dismissed with costs.*

Solicitors : *Carr & Co.* for the debtor.

*Woodbridge & Sons* for the petitioning creditor.



Cases referred to or relied upon :—

*Ex parte Dodd, In re Ormston*, L. R. 3 Ch. Div. 352.

*Ex parte Rogers, In re Rogers*, L. R. 15 Ch. Div. 207.

*In re Lindsay, Ex parte Lindsay*, L. R. 19 Eq. 458 ; 44  
L. J. Bank. 5 ; 31 L. T. 415.

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IN RE  
WINBY,  
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WINBY.

IN RE GRIFFITH.

*Bankruptcy Act, 1883, section 18.*

*Scale of Fees and Percentages, Table A.*

BEFORE  
MR. JUSTICE  
CAVE.  
IN CHAMBERS.  
1886.

*Question whether proposal of Debtor a Composition or Scheme of Arrangement—  
Fees.*

April 13th.

The proposal put forward by a debtor provided, that all the property of such debtor divisible among his creditors should vest in a trustee, and, subject to the provisions of the scheme, be administered according to the law of bankruptcy : that, in addition, the sum of 100*l.* a year out of a pension of 297*l.* belonging to the debtor should be paid to the trustee under the scheme until, with the rest of the debtor's property, all the costs relating to the bankruptcy should have been paid, and the creditors should have received 15*s.* in the pound upon the amount of their debts : that after payment of 15*s.* in the pound to the creditors upon their debts and of all the costs, charges, and expenses, the trustee should hand over to the debtor the surplus of the estate : and that as from the date of the confirmation of the scheme by the Court the debtor should be released and discharged from all debts provable under the bankruptcy.

On the debtor applying to the Court for its approval, the Registrar was in doubt whether such proposal required to be stamped as a composition or a scheme of arrangement, and the question was referred to the Judge for decision.

*Held* : That the arrangement in question had more of the elements of a scheme than of a composition ; and that the fee must be paid on the estimated value of the 100*l.* a year as an asset.

THIS was a case referred by the Registrar to the Judge in Bankruptcy raising the question whether the proposal which had been made by the debtor, *G. C. Griffith*, was a composition or a scheme

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of arrangement for the purpose of deciding the proper stamp to be placed thereon.

By Table A of the Scale of Fees and Percentages, June 15th, 1885, the stamp required upon an application to the Court to approve a scheme is taken upon the gross amount of the estimated assets. In the case of a composition the stamp is taken upon the gross amount of the composition.

In the present case the debtor's statement of accounts showed debts and liabilities to the amount of 4488*l.* 17*s.* 4*d.*, with assets *nil*. The debtor mentioned the fact, however, that he had a "retired allowance from the Inland Revenue of 297*l.* per annum."

The proposal made by the debtor was in the form following:—

1. That all the property of the debtor divisible among his creditors shall vest in a trustee, and that subject to the provisions of this scheme, the said property of the debtor shall, as near as may be, be administered according to the Law of Bankruptcy.

2. That, in addition, the sum of 100*l.* per annum out of the pension receivable by the debtor shall, with the consent of the Inland Revenue, be paid to the said trustee for the benefit of the creditors until, with the above property, all the costs relating to the bankruptcy shall have been paid, and the said creditors shall have received 15*s.* in the pound upon the amount of their debts.

3. That John Henry Tilly, of 37, Queen Victoria Street, in the City of London, Chartered Accountant, shall be appointed trustee to administer the debtor's property at such remuneration as the Committee of Inspection may from time to time fix, and that the property of the debtor shall vest in him as from the date of the confirmation of this scheme by the Court.

4. That there be a Committee of Inspection for the purpose of superintending the debtor's property, and that the provisions of section 22 of the Bankruptcy Act, 1883, and other provisions thereof relating to committees of inspection, do, in so far as applicable, apply to the committee appointed under this scheme; that the Committee of Inspection shall consist of three members, and that Horace Whitely Chatterton, 40, Chancery Lane; William Cleaver, 36, Emperor's Gate; and Frank Bocquet, 1, Long Acre, all in the county of Middlesex (two to form a quorum), do constitute the Committee of Inspection in the first instance.

5. That the debtor shall, to the utmost of his power, aid in the realization of his property and the distribution of the proceeds among his creditors.

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6. That all debts directed by the Bankruptcy Act, 1883, to be paid in priority to other debts, shall be so paid.

7. That all costs, charges and expenses (other than the costs of the Official Receiver) of these proceedings, and generally in relation to the affairs of the debtor and the preparation of this scheme of arrangement, and the obtaining the approval of the Court thereto, shall be taxed and paid by the trustee.

8. That the costs of the Official Receiver (if any) shall be taxed and paid by the trustee, or if the Court so direct, the Official Receiver shall retain such sum as the Court may fix to answer his costs, charges and expenses, accounting for the same to the trustee.

9. That after payment of 15s. in the pound to all the said creditors upon their debts, and all the costs, charges and expenses hereinbefore mentioned to be paid the trustee, shall re-vest in or assign and hand over to the debtor the surplus of the estate.

10. That as from the date of the confirmation of this scheme by the Court the debtor shall be released and discharged thereby from all debts provable under this scheme, to the same extent as if the order confirming the scheme were an absolute order of discharge granted in bankruptcy.

From this it will be seen that it was provided by clause 1 that all the property of the debtor divisible among his creditors should vest in a trustee, and subject to the provisions of the scheme be administered according to the law of bankruptcy. By clause 2, that in addition, the sum of 100*l.* a-year out of the pension of 297*l.* above referred to should, with the consent of the Inland Revenue, be paid to the trustee under the scheme until, with the rest of the debtor's property (that is the property mentioned in clause 1), all the costs relating to the bankruptcy should have been paid, and the creditors should have received 15s. in the pound upon the amount of their debts. By clause 9, that after payment of 15s. in the pound to the creditors upon their debts, and of all the costs, charges and expenses, the trustee should re-vest in or assign and hand over to the debtor the surplus of the estate. And

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lastly, by clause 10, that as from the date of the confirmation (that is, approval) of the scheme by the Court, the debtor should be released and discharged from all debts provable under the bankruptcy.

Under these circumstances Mr. Registrar Brougham, before whom the matter was, considered that the proposal was for payment of a composition of 15s. in the pound upon the amount of the debtor's debts—viz., upon 4,488*l.* 17*s.* 4*d.*, and that stamp duty was required upon the amount of 15s. in the pound thereof as a Composition.

The debtor, on the other hand, contended that the proposal was a Scheme of Arrangement, and that the stamp was required as such.

Several other cases being in readiness to be brought forward in which the principle involved was the same, the matter was referred to the judge for decision.

*Herbert Reed*, for the debtor.

On the debtor applying for a day to approve his proposal, the Court doubted whether what the creditors had allowed was a scheme of arrangement or a composition. It is clear that this was intended to operate as a scheme of arrangement. There is a great difference between this proposal and an ordinary composition. Here there are no terms that the sum of 15s. is to be accepted by the creditors in satisfaction of the debts. There is no time when that sum is to be paid. It is not a question of composition. It may be that the estate will never realise the 15s. A composition is a sum certain to the creditors which they shall accept in satisfaction of their debts. When a certain portion of money is to be paid at a certain time and in a certain way, it is a composition.

\* \* \* \*

[CAVE, J. Either it is a composition and you must pay on it as such, or you must take it as a scheme and pay on the 100*l.* a-year.]

We shall not evade payment. Table B provides for that. There

must be some arrangement when the assets are not capable of being estimated.

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 {  
 IN RE  
 GRIFFITH.

[CAVE, J. This asset can be estimated.]

*Muir Mackenzie*, for the Board of Trade.

It is rather difficult to say upon what sum the debtor proposes to pay stamp duty, inasmuch as his statement of accounts shows no estimated assets, unless it be upon the capitalised amount of 100*l.* a-year which he proposes shall be paid out of his pension. I submit that this is a composition of 15*s.* in the pound, with a possible defeazance if the debtor should die. The debtor proposes that 100*l.* a-year shall be set aside out of his pension until 15*s.* in the pound has been paid. There is no resemblance between this arrangement and a scheme of arrangement where the whole assets go to a trustee and he administers the bankruptcy. Section 18, sub-section (12), of the Bankruptcy Act, 1883, provides that, "If, under or in pursuance of a composition or scheme, a trustee is appointed to administer the debtor's property or manage his business, Part V. of this Act (which deals with trustees in bankruptcy) shall apply to the trustee as if he were a trustee in a bankruptcy, and as if the terms 'bankruptcy,' 'bankrupt,' and 'order of adjudication,' included respectively a composition or scheme of arrangement, a compounding or arranging debtor, and order approving the composition or scheme." For the purpose of construing Table A, it is necessary to look first at what the arrangement is, and secondly, at the provisions of the table. In Table A the scheme means where the estate is vested in a trustee for administration. Here that is wanting. Part of the pension only is to vest in the trustee for a limited time. The debtor out of his 297*l.* furnishes 100*l.* to the trustee. The principal property is 297*l.*, and only 100*l.* vests.

[CAVE, J. Can that be a composition which the creditors may never get?]

*Herbert Reed*, in reply :

By the first clause of the scheme all the property of the debtor

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vests in the trustee. This is a scheme, because if we pay on a composition we are paying on what the creditors may never get, and that alone shows we ought not to pay in this manner.

CAVE, J. :

Judgment.

Where the debtor makes over his assets to be administered by a trustee there is no doubt that that is a scheme. Where the debtor keeps his assets and undertakes to pay over to the creditors a certain sum, that is a composition. The arrangement in this case bears a resemblance in part to one and in part to the other. The debtor, apart from his pension, keeps none of his assets : they are all to go to the trustee. The debtor is also to pay a certain sum out of his pension. Now I think that this arrangement is more nearly a scheme than a composition. If the debtor were made bankrupt the Court would not order the whole pension to be given up to the creditors, it would order a part only. Looking at the whole circumstances—though it is by no means a case free from doubt—I am of opinion that this arrangement has more of the elements of a scheme than of a composition. And I am the more inclined to this opinion by the results which follow from it. Holding it to be a scheme, the fee must be paid on the estimated assets, while if it were held to be a composition the fee would have to be paid on a sum which may not come to the creditors at all. As I have said, the question is one which is not easy to decide, but I think the arrangement is more of a scheme than a composition, and thus holding it to be a scheme, the fee must be paid on the estimated value of the 100*l.* a-year as an asset.

*Order accordingly.*

Solicitors : *Mumms & Longdon*, for the debtor.

*W. W. Aldridge*, for the Board of Trade.

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**PRACTICE.**

IN RE HAGAN AND CO., EX PARTE ADAMSON AND  
RONALDSON.

BEFORE  
MR. JUSTICE  
CAVE.  
1886.  
April 21st.

*Vivâ voce evidence—Application for leave, to whom to be made.*

*Held:* That where in a case to be heard before the Judge in Bankruptcy it is desired to use *vivâ voce* evidence, the application for leave to give such *vivâ voce* evidence must be made beforehand to the Judge, and not to the Registrar.

THIS was an application on behalf of Messrs. *Adamson & Ronaldson*, the petitioning creditors in the bankruptcy, for an order that the proof of debt for 2,900*l.* 4*s.* 11*d.* tendered by one *Kate Moakes* at the first meeting of the creditors, and marked by the chairman of that meeting as objected to, might be rejected, and the vote in respect of such proof be declared invalid.

It being wished by the applicants to adduce *vivâ voce* evidence in support of their case, an order was, on April 14th, obtained *ex parte* from Mr. Registrar *Brougham* in the following form:—"It is ordered that the evidence to be adduced on the hearing of the motion before the Judge, set down for the 19th April instant, as to the admission of the proof of debt of *Kate Kiero Moakes* at the first meeting of creditors herein be taken *vivâ voce* on the hearing of such motion, and that notice of this order be given to \* \* \* the solicitor for the said *Kate Kiero Moakes*."

*Morton Smith*, for Messrs. *Adamson & Ronaldson*.

*Herbert Reed*, for Miss *Moakes*.

[CAVE, J. How came this order for *vivâ voce* evidence?]

*Morton Smith:*

It was obtained by reason of what was thought to be the direction of your Lordship. In the case of *In re Genese, Ex parte Kearsley & Co.* (see *ante*, p. 57) your Lordship said that an application to be

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 IN RE  
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allowed to give *vivâ voce* evidence ought to be made beforehand, and not at the same time with the motion, upon the hearing of which it is desired to use such evidence.

CAVE, J. :

It is perfectly true that I said application ought to be made beforehand, but that is application to this Court. There is no object in going to the Registrar. If application is made to this Court I can then see the nature of the case and fix a suitable day for hearing it. This case must stand over until May 4th.

Solicitors : *Miller, Wiggins & Naylor*, for Messrs. Adamson & Ronaldson.  
*Bradley & Co.*, for Miss Moakes.

Case referred to :—

*In re Genese, Ex parte Kearsley & Co.*, see *ante*, p. 57.

## PRACTICE.

COURT OF  
 APPEAL.  
 BEFORE THE  
 MASTER OF  
 THE ROLLS,  
 LINDLEY, L.J.  
 and  
 LOPES, L.J.  
 1886.  
 April 16th.

IN RE GRANT, EX PARTE WHINNEY.

*Bankruptcy Act, 1883, sections 18 and 27.*

*Scheme of Arrangement—Power of Trustee under a Scheme to obtain examination of Witnesses under section 27—Meaning of "Trustee" in section.*

*Held*: That the term "trustee" in section 27 of the Bankruptcy Act, 1883, which provides that the Court may, on the application of the official receiver or trustee, at any time after a receiving order has been made against a debtor, summon before it persons for the purpose of discovery of the debtor's property, does not include a trustee under a scheme of arrangement of a debtor's affairs accepted by the creditors and approved by the Court under section 18 of the Act.



THIS was an appeal from a decision of Mr. Registrar Brougham, discharging from attendance certain witnesses summoned for examination under section 27 of the Bankruptcy Act, 1883.

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IN RE  
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WHINNEY.

Section 27 provides:—“(1) The Court may, on the application of the official receiver or trustee, at any time after a receiving order has been made against a debtor, summon before it the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or any person whom the Court may deem capable of giving information respecting the debtor, his dealings or property, and the Court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings or property. (2) If any person so summoned, after having been tendered a reasonable sum, refuses to come before the Court at the time appointed, or refuses to produce any such document, having no lawful impediment made known to the Court at the time of its sitting and allowed by it, the Court may, by warrant, cause him to be apprehended and brought up for examination.”

In July, 1885, a receiving order was made against the debtor, *Albert Grant*.

A scheme of arrangement of the debtor's affairs was subsequently accepted by the creditors, and approved by the Court, by the terms of which all the property of the debtor was to be assigned to a trustee for the benefit of his creditors, and to be administered according to the law of bankruptcy.

Under this scheme, Mr. *Whinney* was appointed the trustee, and on August 27th, 1885, the receiving order against the debtor was rescinded.

For the purpose of carrying out his duties in the administration of the debtor's property, certain persons were summoned at the instance of Mr. *Whinney*, the trustee under the scheme, for examination under section 27 of the Act.

Objection was taken by the persons so summoned, however, that the Court had no jurisdiction, and that a trustee under a scheme of arrangement was not a “trustee” within the meaning of the said section.

The learned Registrar having allowed the objection, and discharged

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GRANT,  
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WHINNEY.

such witnesses from attendance without examination, Mr. *Whinney* now appealed.

*Bigham, Q.C. (Sidney Woolf with him), for Mr. Whinney.*

Substantially the objection is that this is not a bankruptcy but a scheme of arrangement, and therefore that section 27 does not apply. These persons say, this is not a bankruptcy; Mr. *Whinney* is not a trustee in a bankruptcy, and the Court has no jurisdiction. Section 18 of the Act provides in sub-section (10), that "The provisions of a composition or scheme under this section may be enforced by the Court on application by any person interested, and any disobedience of an order of the Court made on the application shall be deemed a contempt of Court. (12) If, under or in pursuance of a composition or scheme, a trustee is appointed to administer the debtor's property or manage his business, Part V. of this Act shall apply to the trustee as if he were a trustee in a bankruptcy, and as if the terms 'bankruptcy,' 'bankrupt,' and 'order of adjudication' included respectively a composition or scheme of arrangement, a compounding or arranging debtor, and order approving the composition or scheme. (13) Part III. of this Act shall, so far as the nature of the case and the terms of the composition or scheme admit, apply thereto, the same interpretation being given to the words 'trustee,' 'bankruptcy,' 'bankrupt,' and 'order of adjudication,' as in the last preceding sub-section." If Parts III. and V. of the Act are to apply, section 27, which is in Part I., would also seem to apply.

[THE MASTER OF THE ROLLS. When a scheme has been approved of, why should the Court require knowledge of the debtor or his property?]

Then by the Interpretation clause—section 168—of the Act the term "trustee" is thus defined, "In this Act, unless the context otherwise requires \* \* \* 'Trustee' means the trustee in bankruptcy of a debtor's estate." The question therefore is, does the context in section 27 require a different meaning on the word trustee to that which the definition clause puts? Now I wish it to be particularly noticed that in section 27 the words used are "at any time after a receiving order has been made against a debtor."

That is a large term. The use of the word "debtor" which includes, as well as a bankrupt, also a man amenable to the Act, and who has not been made bankrupt, shows that "trustee" in the section means a trustee under a scheme as well as in a bankruptcy.]

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[LOPES, L. J. If you read the other sub-sections of section 27, they none of them seem to relate to a scheme but to a bankruptcy.]

Unless the power is given to a trustee under a scheme he must be driven away from this Court to the Courts of Common Law if he wishes to collect the debts of a debtor.

[LOPES, L. J. I must say that, to my mind, also it shows a strong case against you that section 18 deals with compositions and schemes of arrangement; and sub-section (12) says that when a trustee is appointed under a composition or scheme, Parts V. and III. of the Act shall apply as if he were a trustee in a bankruptcy.]

*Swinfen Eady*, for the persons summoned as witnesses, was not called upon.

THE MASTER OF THE ROLLS (LORD ESHER) :

It is clear upon sub-section (12) of section 18 of the Bankruptcy Judgment Act, 1883, that the trustee under a scheme of arrangement is not in that part of the Act considered as a trustee in a bankruptcy. He is distinguished from it. *Primâ facie* therefore he is not a trustee in bankruptcy. Under the section certain portions of the Act are to be applied to the scheme, and *primâ facie* other parts of the Act are not. Part I. of the Act is not mentioned as one of the portions of the Act which is to be so applied, and as regards Parts V. and III. of the Act, the trustee under a scheme is distinguished from, but is to be treated "as if he were a trustee in a bankruptcy." Now we find in section 27 the word "trustee." The meaning of the word "trustee" as given in the interpretation clause is "the trustee in bankruptcy of a debtor's estate," unless the context otherwise requires. We must look therefore to section 27 to see if the context there requires us to include a trustee under a scheme. So far from section 27 showing this, every step in the section, in my

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opinion, seems to refer to what will occur to a trustee in bankruptcy and not under a scheme. Therefore the context, so far from showing that we ought to include a trustee under a scheme, shows quite the contrary. The creditors ought not to adopt a scheme and get the Court to approve of it until they have made out clearly all the debts and liabilities. They ought to take care everything is in order before the scheme is adopted, and if they do not they must take the consequences. In my opinion, therefore, the appeal must be dismissed.

LINDLEY, L. J. :

I am of the same opinion. I certainly think that the Registrar has placed the proper construction on section 27. I do not enter into any question as to whether it would be useful if this section 27 could be invoked by a trustee under a scheme. What we have to look at is whether it can be done. In the interpretation clause of the Act the term trustee is defined. If we turn to the section and put in those substituted words, its meaning is quite clear. It seems to me that if any difficulty arises in the working of the scheme the proper course is under sub-section (11) of section 18 to annul the scheme. I certainly cannot put any other meaning on the word "trustee" in section 27 than that given to it in the interpretation clause.

LOPES, L. J. :

I am of the same opinion. By the interpretation clause "trustee" means "the trustee in bankruptcy of a debtors' estate," and that is the meaning to be attached to it, unless the context otherwise requires. In section 27 all the section shows no context to require a different interpretation. I think, in fact, the whole context shows that the meaning given in the interpretation clause ought to be upheld. Then as to sub-section (12) of section 18, it is most observable that the part of the Act there mentioned, which is to apply, is Part V. Nothing is said as to section 27. Further than this, in my opinion, the legislature used the word "trustee" expressly in the section for this reason, viz. :—in order to limit, so

far as it could, the expenses in the case of a composition or scheme of arrangement.

*Appeal dismissed with costs.*

Solicitors: *M. Abrahams & Co.*, for Mr. Whinney.

*Drake, Son & Parton*, for the persons summoned as witnesses.

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GRANT,  
EX PARTE  
WHINNEY.

## PRACTICE.

IN RE WISE, EX PARTE BROWN.

*Bankruptcy Appeals (County Courts) Act, 1884, section 2.*

*Appeal from County Court—Order of Divisional Court to pay Money out—Duty of Registrar.*

DIVISIONAL  
COURT.  
BEFORE  
CAVE, J.,  
and  
GRANTHAM, J.  
1886.  
April 21st.

*Held:* That where the Divisional Court in Bankruptcy on an appeal from a County Court allows such appeal, and gives leave to the unsuccessful respondent to appeal to the Court of Appeal, but makes an order directing moneys in Court to be paid out, the Registrar of the County Court must comply with such order forthwith, and has no right to decline to pay out such moneys until the time limited for appeal to the Court of Appeal has expired.

THIS was a motion by special leave calling on Mr. Rowland, the registrar of the County Court at Croydon, to show cause why the sum of 450*l.*, being money paid into that Court, should not be paid out to the applicant.

On March 1st, 1886, the case of *In re Wise* was heard before Mr. Justice CAVE and Mr. Justice GRANTHAM, sitting as a Divisional Court in Bankruptcy on an appeal from the Croydon County Court, when the decision given by the County Court Judge was reversed.

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WISE,  
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BROWN.

Application was then made by the respondent to the appeal for leave to appeal to the Court of Appeal, which leave was given; but an order was nevertheless made that 450*l.*, money in Court, should be paid out.

That order was drawn up on March 18th, but notwithstanding repeated applications made to him, the registrar of the County Court declined to pay out the said sum of 450*l.* until the time allowed for an appeal to the Court of Appeal had expired.

On April 16th the case came on in due course for hearing in the Court of Appeal, when the decision of the Divisional Court was confirmed. The money not having been paid out, application was now made to the Divisional Court to enforce its order.

*H. D. Greene, Q.C. (F. C. Willis with him), for the applicant.*

Although leave to appeal was given by the Divisional Court, the Court made an order that the money in Court should be paid out. That order ought to have been obeyed. The order was drawn up on March 18th, and there was a good deal of correspondence with the registrar. On March 18th a letter was written to him asking for the money out of Court, and on March 31st a further letter to the same effect. On April 2nd the registrar replied that "he cannot send the 450*l.* until the time for appealing to the Court of Appeal has expired; that this is clear as a matter of practice." On April 10th and 12th there was further correspondence, and on the latter day the registrar again declined to entertain any thought of the matter or to break his rule to pay money out during the time allowed for appeal. Thereupon, as your Lordship, Mr. Justice CAVE may remember, the case was mentioned *ex parte* to your Lordship, and you then expressed the opinion that the money ought to be paid out at once. Your Lordship's words were that "the order of the Divisional Court was clear and distinct, and ought to have been complied with." Owing to the delay the appeal came on in the Court of Appeal last Friday, when the decision of the Divisional Court was upheld, and we were not called upon. The registrar still refuses to pay the money out, however, until he has seen the order of the Court of Appeal. This money has been in Court a year absolutely without fruit. The order of the Divisional Court ought to have been complied with at once.

The registrar had no right whatever to refuse to pay the money out. He ought to have obeyed the order at once. Since the order of the Divisional Court seven weeks ago the money has been lying dead, entirely through the fault of the registrar, and I ask that an order should be made upon him to pay out, and also to pay the costs.

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IN RE  
WISE,  
EX PARTE  
BROWN.

*F. Wright*, for the County Court registrar.

The registrar has endeavoured to do what he considered to be his duty. He has not put himself in opposition to your Lordships. What he has done he has honestly done.

[CAVE, J. It is a monstrous thing surely.]

The registrar has misunderstood the rules. He has been registrar for eighteen years, and he says that he has never been asked to pay out money pending appeal, or during the time when an appeal may be brought.

[CAVE, J. If there were such a practice it would be perfectly immaterial. In this case there was a direct order.]

I would ask your Lordships' indulgence as to costs.

CAVE, J. :

It is perfectly clear in this case that the registrar has misunderstood his duty. His duty was to obey the order of this Court. The order of this Court was, that, notwithstanding that an appeal was pending, this money should be paid out. The registrar has not paid the money out. He has not even done so now, and he has put the applicant to the expense of coming here to-day. He must undoubtedly pay the costs of this motion. Even that is inadequate to mark his conduct, because by his conduct he has deprived the applicant of interest on the money for seven weeks. He must certainly pay the costs of this motion, or rather, as there have been other applications with respect to the payment of this money, he must pay the costs of this motion, and the costs of

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and occasioned by his refusal, so far as those relate to the applications which have been made.

GRANTHAM, J., concurred.

*Order accordingly.*

Solicitors: *Clarkson, Greenwell, and Wyles*, for the applicant.  
*Rowland*, for the registrar.

BEFORE  
MR. JUSTICE  
CAVE.  
1886.

IN RE TICKLE, EX PARTE LEATHER SELLERS'  
COMPANY.

April 19th.

*Bankruptcy Act, 1883, sections 39 and 55.*

*Lease—Proviso that on Breach of any of the Covenants Lease "shall cease, determine, and be void"—Election of Lessor.*

When a lease contains a proviso or condition that on breach of any of the covenants such lease "shall cease, determine, and be void to all intents and purposes whatsoever," such words must be construed to mean void at the election of the lessor.

Thus, where a lease contained a proviso to the effect that if the lessee should become bankrupt or insolvent the lease "shall cease, determine, and be void," and, the lessee having become bankrupt, the trustee in the bankruptcy rejected a proof put in by the lessors founded on such lease, upon the ground that on the bankruptcy the lease became void.

*Held:* That such rejection by the trustee was wrong, and must be reversed.

**T**HIS was a motion on behalf of the Leather Sellers' Company to reverse the rejection by the trustee of the sum of 212*l.*, part of a proof of debt put in by the said company in the bankruptcy of the debtor *Tickle*.

The proof in question was grounded upon a lease granted in the year 1883 by the company to the debtor for a period of twenty-one years.



This said lease contained a proviso to the effect that if the said *Tickle*, his executors, &c., should become bankrupt or insolvent, the lease "shall cease, determine, and be void," &c., except as to any right of action for dilapidations.

On the bankruptcy of *Tickle* the company put in a proof against his estate, claiming 62*l.* for rent from September to December, 1885, 20*l.* for dilapidations, and 150*l.*, the difference between the rent reserved and the rent for which the premises had been re-let.

The trustee in the bankruptcy rejected the proof as to the 62*l.*, and also as to the 150*l.*, on the ground that on the bankruptcy the lease became void.

From this rejection the company now appealed to the Court.

*Herbert Reed*, for the company.

The objection assigned by the trustee is that by the lease on the bankruptcy or insolvency the lease became void. The trustee in effect said to the landlords, "You agreed that the lease should be void on bankruptcy." But void in such a case means voidable. In *Woodfall*, ed. 11, at page 178, it is clearly stated that "When a lease contains a proviso or condition that on breach of any of the covenants, the lease 'shall cease, determine, and be utterly void, to all intents and purposes whatsoever,' such words will be construed to mean *void at the election of the lessor* (*Roberts v. Davey*, 4 B. & Ald. 667; *Pennington v. Cardale*, 3 H. & N. 656; *Hughes v. Palmer*, 19 C. B. N. S. 393, 404, 407; *Cole Ejec.* 408). The lessee will not be allowed to take advantage of his own wrongful act or omission, and to say that thereby the lease has become void. The lessor must do some act evidencing his intention to enter for the forfeiture and determine the lease; and the lease will be *avoided from that time only*; but previous arrears of rent may be sued for, although upon re-entry the lessor is to have the premises again 'as if the said indenture had never been made.'" I submit, therefore, that the trustee's views in this case are wrong. The lease did not become terminated, but it was only voidable. On December 14th, 1885, the trustee disclaimed; and on December 25th the landlords re-let the premises at a less rent.

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*F. C. Willis*, for the trustee in the bankruptcy.

The covenant in the lease is really wider than that which is given in *Woodfall*.

CAVE, J. :

Judgment.

It appears to me that the landlords in this case are right. There was no doubt a proviso to terminate the lease on bankruptcy. But it was in the option of the landlords whether they would do so or not. They have not done so. The lease is terminated by disclaimer on the part of the trustee. The landlords are entitled to prove for loss of rent between September and December, and also for the difference in the re-letting. The application will therefore be allowed with costs.

*Application allowed with costs.*

Solicitors : *Simpson, Palmer, & Winder*, for the Leather Sellers' Company.

*W. Beck*, for the trustee in the bankruptcy.

Cases referred to :—

*Roberts v. Davey*, 4 B. & Ald. 667.

*Pennington v. Cardale*, 3 H. & N. 656.

*Hughes v. Palmer*, 19 C. B. N. S. 393.

BEFORE  
MR. JUSTICE  
CAVE.  
1886.

IN RE BEAR, EX PARTE THE CHIEF OFFICIAL RECEIVER.

April 15th.

*Bankruptcy Act, 1883, section 48.*

*Fraudulent Preference—Assignment—Payment to Surety.*

On application by the trustee to declare void, on the ground of fraudulent preference, an assignment of certain patent rights and also the payment of a sum of money made by the debtor within three months of a bankruptcy petition being presented against him, to his uncle who had guaranteed the payment of a debt due from such debtor to another person, the objection was raised that the payment now sought to be set aside had been made in consequence of the guarantee and not "in favour of any creditor."

*Held:* That the assignment was clearly a fraudulent preference; and that, on the facts of the case, the uncle of the debtor at the time of the payment of the said money to him being independently of the guarantee, a creditor for goods sold, such payment was also void under the section.

*Quære:* Whether if a debtor, within the time limited by the section, makes a payment to a person who has guaranteed a debt due from him to a third party, and which the surety has not then paid, such transaction can be set aside as being a payment made in favour of "any creditor" within section 48 of the Bankruptcy Act, 1883.

THIS was a motion on behalf of the chief official receiver acting as trustee in the bankruptcy of *Bear* for an order declaring a certain assignment executed by the bankrupt, and also the payment of a sum of 212*l.* made by the said bankrupt, in favour of one *Wohlgemuth*, to be void under section 48 of the Bankruptcy Act, 1883, as being a fraudulent preference.

On November 14th, 1885, the debtor *Bear*, who carried on business as a tobacco merchant, committed an act of bankruptcy; and on November 17th a receiving order was made against him.

Previously to this:—viz., on October 13th, 1885, the debtor assigned to his uncle Mr. *Wohlgemuth*, to whom he was then indebted for goods sold, a patent right for moulding cigars.

And on October 24th he also handed over to *Wohlgemuth*, who had guaranteed a debt of the bankrupt due to one *Haas*, the said sum of 212*l.* being in part the amount of compensation received by him from the insurance company on account of a fire which had occurred at his business premises.

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 EX PARTE  
 THE CHIEF  
 OFFICIAL  
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The official receiver as trustee now applied that these transactions might be set aside.

Section 48, sub-section (1) of the Bankruptcy Act, 1883, provides that, "Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors shall, if the person making, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy."

*Herbert Reed* for the official receiver :

These transactions clearly amount to a fraudulent preference within the section, and are therefore void. For some months before the debtor could not pay twenty shillings in the pound.

*Ringwood* for Mr. Wohlgemuth :

I admit that the assignment of the patent was a fraudulent preference. As to the payment of the 212*l.*, however, that was money for which Mr. *Wohlgemuth* was liable to *Haas*. There is no evidence of any fraud on the part of *Wohlgemuth*. In his affidavit he says that he pressed the debtor, and he knew nothing of his position. He was surety for the debtor and wished to pay *Haas*, and told the debtor so. Moreover, this could not be a fraudulent preference within section 48, for the section only speaks of a payment made in favour of "any creditor." Mr. *Wohlgemuth* was not then a creditor. The money was money for which he was liable to *Haas*, and as to that he was not a creditor. "A surety does not become a creditor of the principal debtor merely by force of the relation existing between them, although the surety may have made himself liable absolutely to the creditor, and the debtor may have undertaken to indemnify him. Until the surety has actually paid the money, his liability is wholly contingent and uncertain." (See *Robson's Bankruptcy*, 4th ed., p. 284: Counsel also referred to

*Ex parte Stubbins, In re Wilkinson*, L. R. 17 Ch. Div. 38, 29 W. R. 655). Mr. *Wohlgemuth* had not then paid *Haas*. The section only applies in the case of a creditor strictly so called. This was a *bonâ fide* transaction before the act of bankruptcy. A creditor must be a person to whom a debt is due, and the section confines it to "a creditor." This transaction occurred before the receiving order was made, and without knowledge of any act of bankruptcy. *Wohlgemuth* had done nothing at that time to make himself a creditor within section 48. That section does not apply until a man has become a creditor (Counsel referred to *Ex parte Serjeant*, 2 Gl. & J. 23 : *Ex parte Kelly & Co., In re Smith*, L. R. 11 Ch. Div. 306, 48 L. J. Bank. 73, 40 L. T. 404, 27 W. R. 830).

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*Herbert Reed* in reply :

It is admitted that the assignment of the patent was a fraudulent preference. So also the payment of the money must have been made with intent to prefer *Wohlgemuth*. His own affidavit shows that he was in effect a creditor, and that a balance was owing to him after the assignment.

CAVE, J. :

I am of opinion that neither of these transactions can be upheld. Judgment. It is clear that *Wohlgemuth* was a creditor. The courts may have looked with careful eye to see whether a person was a creditor or not, yet this man was undoubtedly a creditor, at any rate, to the extent of some 20*l.* balance for goods sold. Whether he was so or not as to the liability under which he stood, therefore, it is not necessary for me now to decide. The assignment was clearly a fraudulent preference, and the creditor must have known it to be so. He has never suggested any reason why the transaction should take place, and now in fact admits it. The application must be allowed with costs.

*Application allowed with costs.*

Solicitors : *W. W. Aldridge*, for the official receiver as trustee.  
*Turner & Son*, for Mr. *Wohlgemuth*.

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 IN RE  
 BEAR,  
 EX PARTE  
 THE CHIEF  
 OFFICIAL  
 RECEIVER.

Cases relied upon or referred to :—

*Ex parte Stubbins, In re Wilkinson*, L. R. 17 Ch. Div. 38, 29 W. R. 655.  
*Ex parte Serjeant*, 2 Gl. & J. 23.  
*Ex parte Kelly, In re Smith*, L. R. 11 Ch. Div. 306, 48 L. J. Bank. 73, 40 L. T. 404, 27 W. R. 830.

## PRACTICE.

BEFORE  
 MR. JUSTICE  
 CAVE.  
 1886.

IN RE WEBSTER, EX PARTE FOSTER & Co.

*Bankruptcy Act, 1883, section 18.*

April 19th  
 and 20th.

*Composition—Failure of Debtor to Pay—Duty of Registrar.*

*Held*: (1) That it is the duty of the Registrar to hear and decide those cases brought before him, and which he is not prevented from so deciding by any order of the Judge, or by the Rules or Statute: and that the Registrar without good cause, and except on the ground of novelty or difficulty, ought not to adjourn any such case for the purpose of its being heard before the Judge in bankruptcy.

(2) Where on application to the Court to approve a composition the official receiver reported that he had a sufficient sum in his hands for payment thereof, such report being founded on the estimate given by the debtor in his statement of affairs, which subsequently proved to be wrong, and an order was in consequence asked for against the official receiver personally to make up the required sum.

*Held*: (1) That the applicants were not entitled to an order against the official receiver personally.

(2) That if a debtor thus forms a wrong estimate of his position, unless the amount found to be necessary to pay the composition agreed upon is procured, the proper order for the Court to make is one adjudging such debtor bankrupt and annulling the composition under section 18, sub-section (11), of the Bankruptcy Act, 1883.

THIS was an application by Messrs. *Foster & Co.*, creditors of the debtor *Webster* to the amount of 2,568*l.* 0*s.* 9*d.*, for an order that the chief official receiver, or the said debtor, or one of them,

should pay to the said applicants the sum of 198*l.*, being the amount of composition due to them as creditors: and, in the alternative, for an order under section 18, subsection (11) of the Bankruptcy Act, 1883, to annul such composition, on the ground that the debtor had failed to lodge with the official receiver the amount necessary for the payment thereof, or to pay the same.

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WEBSTER,  
EX PARTE  
FOSTER & Co.

On January 10th, 1885, a receiving order was made against the debtor *Webster* upon his own petition, the chief official receiver being appointed as trustee.

In the statement of affairs filed by the debtor, the amount of debts due to Messrs. *Foster & Co.* was set down at 2,050*l.*, with security held by them valued at 1,010*l.*, leaving a balance of 1,040*l.*

On February 5th, 1885, the first meeting of creditors was held and adjourned to February 26th, when resolutions were passed agreeing to accept a composition of 1*s.* 6*d.* in the pound, which resolutions were duly confirmed by a statutory majority of creditors at a subsequent meeting held on April 1st.

Although due notice was given to them, Messrs. *Foster & Co.* did not attend either of these meetings, and on April 10th, 1885, they sent in a proof for 3,089*l.* 17*s.* 3*d.*, estimating their only security at 200*l.*

On April 28th, 1885, application was made to the Court to approve the composition, and the official receiver having stated that the sum necessary for payment had been received by him, such approval was duly given.

On June 17th, 1885, notice was sent to Messrs. *Foster & Co.* that their proof would be objected to, and October 8th was fixed for its investigation, on which day the official receiver went into the matter, and the proof was finally settled by consent at 2,568*l.* 0*s.* 9*d.*

It was then discovered, however, that the official receiver had not sufficient money in his hands to pay the 193*l.* thus becoming due, and in consequence Messrs. *Foster & Co.* now applied to the Court to enforce the payment.

*Laing* for Messrs. *Foster & Co.* :

The official receiver has not sufficient to pay the amount of composition due.

1886.  
IN RE  
WEBSTER,  
EX PARTE  
FOSTER  
& Co.

[CAVE, J. Why do you come to me in this case?]

There was an application made to the registrar against the debtor, and he dismissed the application on the ground that there had been no default on the part of the debtor, but without prejudice to any future application. Another application was made against the official receiver, and the registrar then said it was beyond his jurisdiction to make any order.

[CAVE, J. Why? The registrar must not throw his work upon me. Unless the registrar is precluded by any order of mine, or by anything in the rules or in the statute, he ought to hear the case. This is not a matter which is reserved for me.]

The registrar sent us here.

[CAVE, J. That is just what he had no power to do. The registrar might just as well send to me to hear a public examination. There is only a power to adjourn to me on the ground of novelty or difficulty, if the parties desire it. The best thing is for me to see the registrar, and I will adjourn the case until he can come to me.]

*April 20th.*

[CAVE, J. I have seen the registrar, and I find that he now admits he adjourned this case in error. Under those special circumstances, I will hear it as the parties are here.]

The official receiver intimated to the Court that he had sufficient to pay the composition, and the Court then signified its approval. That was not so. The amount in the hands of the official receiver was not sufficient. Messrs. *Foster & Co.* only knew that after their proof was reduced.

[CAVE, J. The official receiver simply said he had enough to pay what was put down in the statement of accounts.]



He said the amount required for the payment of the composition. He had to pay all the unsecured creditors 1s. 6d. in the pound. When the official receiver made his report, he had *Foster's* proof before him for 3,089l. 17s. 8d., with estimated security 200l., thus leaving them unsecured creditors to the extent of 2,889l. He chose to certify to the Court that he had sufficient to pay all the debts provable under the receiving order. After the debt had been considered, it was found that that statement was false. The official receiver by accepting the trust, has made himself responsible. He has taken upon himself duties, and made a statement which he cannot now deny. The official receiver has been guilty of negligence, and he cannot go behind the certificate he gave. The debtor may justly say that for his part he did all that was necessary.

1886.  
IN RE  
WEBSTER,  
EX PARTE  
FOSTER  
& Co.

*Muir Mackenzie* for the official receiver :

The official receiver has only done his duty, and he ought not to be ordered to pay out of his own pocket this money which he has not received. Messrs. *Foster & Co.*'s claim appeared to be for 1,040l. from the accounts at the time when the composition was agreed upon. No proof had then been sent in by them. The liability of the debtor to *Foster & Co.* was estimated at the above named sum. After that, on April 10th, they lodged their proof for 3,089l. If Messrs. *Foster & Co.* succeeded in proving more than the debt as estimated, that was the debtor's affair. The official receiver did no more than his simple duty in reporting to the Court that the amount estimated by the debtor had been provided. It is the debtor who has to provide the composition.

[CAVE, J. The official receiver made his report on the original statement, and the charge is that since then a larger sum has been proved for.]

The official receiver when acting in this capacity is liable for what comes into his hands and no further. In reporting what he did on the estimated sum he did nothing wrong.

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WEBSTER,  
EX PARTE  
FOSTER  
& Co.

*F. C. Willis* for the debtor Webster :

With regard to the second part of the present motion, the debtor cannot be adjudged bankrupt under section 18, subsection (11), for the simple reason that an application to that effect has already been dismissed by the registrar. If that decision was wrong, *Foster & Co.* ought to have appealed from it. They did not do so, and cannot come here for that purpose. It is a *res adjudicata*. Then will the Court order the debtor to pay this sum? The official receiver was in the wrong. He reported that he had enough to pay the composition. It was gross neglect on the part of the official receiver.

[CAVE, J.: It was gross neglect on the debtor's part too. He understated the debt and he overstated the security.]

Notices of the meetings were sent to *Foster & Co.*, and a summary of the affairs. Those creditors chose to lie by. They did not attend any meeting, and in the meantime the debtor gave up all his property to the official receiver. He had no control after he had so given up.

CAVE, J. :

Judgment.

This is an application by Messrs. *Foster & Co.* for an order directing the official receiver or the debtor to pay to them the sum of 198*l.*, being the amount of composition to which they allege they are entitled as creditors ; or for an order to annul such composition and adjudge the debtor bankrupt on the ground that he has failed to find the sum necessary for the payment of it. The official receiver admits that he has 112*l.* in hand, and he has expressed himself willing to pay that sum over to the applicants. The applicants, however, have refused to accept that sum, and say that they are entitled to 198*l.* if they can recover it. Now I am of opinion that they have no right to recover it from the official receiver. It is true that the official receiver did report to the Court that he had a sufficient sum for the payment of the composition of 1*s.* 6*d.* in the pound. So far he erred. His report was founded on the estimate given in the statement of affairs. But

everybody else seems to have erred also. Messrs. *Foster & Co.* went to sleep. They did not attend the meetings, and they appear to have taken no steps to ascertain what their claim really was. The debtor also estimated the debt at too low a figure, and he overstated the security. I can see nothing which furnishes me with the slightest ground to order the official receiver to pay out of his own pocket the sum which is now asked for. Then as to the debtor himself. There is no proof that the debtor has got the money. He agreed to pay 1s. 6d. in the pound, calculated on a certain statement of debts, and that statement was erroneous. I should myself have thought that that would be a good reason for setting aside the composition, and making the debtor a bankrupt. But the registrar has refused to do this already, and I certainly do not sit here as a Court of Appeal from the decision of the registrar. Whether the registrar may now be prepared to listen to an application to set aside the composition I cannot tell. The case has come to me in a most unsatisfactory manner, and I cannot properly decide it. In the case of such a mistake as this being made, I should have thought that the proper course would be either for the debtor to pay the creditors the composition or to be adjudged bankrupt. It was the debtor's fault, and I should have thought if the money required could not be found, the proper order would be one under section 18, sub-section (11), of the Bankruptcy Act, 1883, which provides that "If default is made in payment of any instalment due in pursuance of the composition or scheme, or if it appears to the Court, on satisfactory evidence, that the composition or scheme cannot in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, or that the approval of the Court was obtained by fraud, the Court may, if it thinks fit, on application by any creditor, adjudge the debtor bankrupt, and annul the composition or scheme." Why that was not done by the registrar I cannot conceive. One application was made to the registrar which he seems to have dismissed without prejudice, and then when another application was made to him, he, without the least justification, directs it to be brought before me. It is impossible that I can deal properly with it. As it is, all I can do is simply to refuse the motion without prejudice to the applicants

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to apply to the registrar to review his decision with regard to adjudging the debtor bankrupt.

*Order accordingly.*

Solicitors: *Deane & Nash*, for Messrs. Foster & Co.  
*W. W. Aldridge*, for the official receiver.  
*Duffield & Bruty*, for the debtor.

## PRACTICE.

DIVISIONAL  
COURT.

BEFORE  
MANISTY, J.,  
and  
CAVE, J.,  
1886.  
May 5th.

IN RE BADCOCK, EX PARTE BADCOCK.

*Bankruptcy Act, 1883, Section 28.*

*Discharge—Absolute refusal of—Discretion of Court.*

*Held:* That in considering the question of a bankrupt's discharge the Court is bound to have regard not to the interests of such bankrupt or of the creditors alone, but also to the interests of the public and of commercial morality: and although facts may not be absolutely proved which would under section 28, sub-section (2), of the Bankruptcy Act, 1883, compel the Court to refuse any discharge, yet where gross misconduct within the said section is shown on the part of the bankrupt, the Court is perfectly justified in declining to grant a discharge upon conditions and in making an order absolutely refusing to such bankrupt any discharge at all.

THIS was an appeal from a decision of the learned judge of the County Court at Oxford refusing absolutely to the bankrupt any order of discharge.

The bankrupt *Badcock* was an auctioneer and estate agent, and also a farmer carrying on business at Oxford and Abingdon.

In the year 1873 he found himself in difficulties, and at that time entered into an arrangement with his creditors, paying them a

composition of 1s. 6d. in the pound. The debtor had since continued in business until February 16th, 1884, the date of adjudication in the present case, the liabilities being now set down at 28,000*l*.

On application being made by the bankrupt for his discharge it was intimated to the County Court that the trustee intended to apply for leave to prosecute the debtor criminally for offences under the Debtors Act, and the application was in consequence refused pending those proceedings.

The bankrupt was subsequently indicted before Mr. Justice FIELD at the Oxfordshire Assizes on the above charge, but at the last moment the prosecution was withdrawn and the prisoner discharged, a verdict of "Not guilty" being entered.

On the bankrupt again applying to the County Court for his discharge, however, the application was opposed by the official receiver and the trustee on several grounds specified in section 28 of the Bankruptcy Act, 1883, *inter alia* (1) That the bankrupt had omitted to keep proper books; (2) That he had continued to trade after knowing himself to be insolvent; (3) That he had brought on his bankruptcy by rash and hazardous speculations; (4) That he had contracted debts without having at the time of contracting them any reasonable or probable ground of expectation of being able to pay them; (5) That he had been guilty of fraudulent breach of trust; (6) That he had previously made a composition with his creditors;—and also on other particular grounds stated in the opening speech of counsel below.

After a lengthened hearing the County Court judge absolutely refused any order of discharge, and from that decision the bankrupt now appealed.

*Bigham, Q.C.* (*Cohen* with him) for the bankrupt Badcock :

The facts to be taken into consideration by the Court are (1.) Whether an order of discharge ought to be granted at all; and (2.) If so, on what conditions? Here the County Court judge absolutely refused to grant any discharge at all. I submit that although the conduct of the bankrupt might be such as to justify a conditional order, there is nothing to justify such absolute refusal. The estate agent and auctioneer business was profitable,

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but the farming was a losing concern. The bankrupt lost at least 19,000*l.* in it, and that outweighed his other profits. It is not suggested that this sum was not lost, but the trustee says the bankrupt ought to have stopped long before he did: that he knew he was insolvent in 1876, and yet he went on trading. That his conduct was rash and hazardous, and that he contracted debts without reasonable expectation of being able to pay them. But the bankrupt explains that he did try to get rid of his farms. He offered to pay a sum down to get rid of the lease, but could not do so. I must admit, however, that those explanations are somewhat contradictory and cannot recommend themselves. Still, although the conduct of the bankrupt cannot recommend itself to your Lordships, it is not such as to warrant an absolute refusal of an order of discharge and for the rest of his life prevent his trading. He states that in his opinion he thought he was solvent up to 1877, when he had a bad year. He then offered to give up his lease, but the landlord would not take it. It may be that he ought to have known before he did that his position was bad. The total liabilities are 23,000*l.*, and the trustee in the bankruptcy—or one of the trustees—is manager of the Bank, which is the largest creditor. There has been no tendency to treat the debtor leniently. When he first applied for the order of discharge it was intimated that the trustee intended to apply for leave to prosecute under the Debtors Act, and the application was in consequence adjourned pending the criminal proceedings. The order to prosecute the bankrupt was made upon representations by the trustee of the most unusual character: the bankrupt was taken before the magistrates and committed for trial. An indictment was prepared under the Debtors Act and the Bankruptcy Act. The accused was charged with concealing property, with making away with money, with destroying books, with falsifying his books—in fact with every conceivable offence. He appeared for trial before Mr. Justice FIELD, the prosecution was withdrawn and a verdict of “Not guilty” taken. There was evidently a desire to punish this man, and without good grounds these proceedings were taken. But when he again applied for his discharge, then all these grounds of opposition as to his conduct and trading and former composition were put forward. Other grounds were also

stated. The bankrupt has a son named *Bingham*, who took that name on coming into money. This son was formerly in partnership with the bankrupt, and monies were advanced by the father to the son and debited to him in the books. The partnership was afterwards dissolved, but in 1880 the father asked his son to come to Oxford to manage his farm. The son did come, as he says at an agreed salary of 400*l.* a-year; he also received other money, which was put to his debit in the books. If there was nothing on the other side, the son would in this way appear a considerable debtor. But the bankrupt did not return his son as a debtor at all. In the books at the bottom of the account there appears in red ink the words "Settled in account," purporting to wipe it out. The sum was 1,700*l.* After the bankrupt's prosecution an action was brought by the trustee against *Bingham* to recover this amount. The defence was raised that the money was not due to the father at all, and the 400*l.* a-year was claimed as a set off. The action was tried before Mr. Justice FIELD, and that learned judge stated that he did not believe either the bankrupt or *Bingham*, or that the allowance of 400*l.* a-year was ever agreed upon. Judgment was therefore given for the trustee, and that transaction is now relied upon in opposition to the discharge. But it does not amount to a fraud on the part of the bankrupt. He knew nothing could be got out of the son.

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[CAVE, J. : That might be a good reason for not debiting the son at all, but it is no reason for writing "settled" to the account.]

Doubtless the conduct is not creditable, but it is not sufficient to justify the Court in absolutely refusing the discharge. The bankrupt was not defrauding anybody. The son was not worth a penny; and there was no deliberate attempt to defraud. Another ground of opposition put forward by the trustee relates to a sum of 21*l.*, which it is said the bankrupt himself received and which ought to have gone to the estate.

[MANISTY, J. : That appears a small matter under the circumstances.]

Then at the last moment a further charge was brought against

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him under section 28, sub-section 3 (h) of the Bankruptcy Act. It was said that the bankrupt had been guilty of breach of trust. A Mr. *Smith*, nephew of the bankrupt, was called to prove that the bankrupt had been appointed trustee under a will jointly with himself. Part of the property consisted of farming stock. The bankrupt had sold the stock, and had not accounted to the trust estate. It was said that this was sufficient under sub-section 3 (h). But the bankrupt's estate was not injured. These three things were relied upon as justifying the refusal of any discharge.

[CAVE, J.: You must not forget the other things mentioned in the report,—that he had not kept proper books, traded rashly, obtained credit, &c.]

The man has undoubtedly violated section 28, but it is not a case where he ought to be prevented from trading at all to which the order appealed from condemns him. The real question is—Is it a wise exercise of the discretion vested in the Court to absolutely refuse any order of discharge to this man? It practically puts an end to his business life. There have been nothing but improvident acts on his part or acts of business folly. There has been no absolute fraud. What ought to have been done? There are certain cases under section 28 in which the Court must refuse the discharge. It must refuse the discharge when the debtor has committed any misdemeanor under the Bankruptcy Act or the Debtors Act. That has not been proved here. And although the Court has the discretion to refuse in other events, yet it ought not to do so except in a very strong case. I submit that this case does not justify such refusal. The discharge ought to have been granted at any rate upon conditions.

*Archibald*, for the trustee in the bankruptcy

*Muir Mackenzie*, for the official receiver,

were not called upon.

MANISTY, J.:

Judgment.

This is an appeal from a decision of the County Court judge at Oxford refusing to grant the bankrupt his discharge, and I say first



of all that I approach this appeal as I do all others with the intention of not reversing the decision which has been given unless good and substantial cause is shown why that should be done. I see no grounds for reversing the decision in the present case. But I will not leave the matter there. The case is a peculiar one. This is so to speak a second bankruptcy. I cannot help taking into consideration that in the year 1873 the bankrupt was in difficulties to the extent of 60,000*l.*, and then paid 1*s.* 6*d.* in the pound. That experience ought to have made him more than careful. So far from that being the case his subsequent conduct does not show that he took any warning, but in my opinion he continued to incur debts without anything like reasonable ground of being able to pay them. This is not a case of a man on the verge of bankruptcy making an effort to avoid bankruptcy, but for eleven years he went on in this reckless manner. We are administering the law of 1883 for the purpose of preventing reckless conduct such as has taken place here. In the Act of 1869 we do not find the stringent provisions which we find in the Act of 1883. If we go back before 1869 we find scarcely any provisions to prevent a man getting his discharge. That state of affairs was felt to be so serious that in 1869 the Debtors Act was passed, and in 1883 this new Bankruptcy Act. Part II. of the Debtors Act deals very fully with the question of punishment of fraudulent debtors, and by section 28 of the Bankruptcy Act various matters—which I need not now go through in detail—have to be considered by the Court in dealing with the question whether or not a bankrupt is entitled to his discharge. Now look at the conduct of this bankrupt under both these statutes. Amongst other things we find that he made two statements to the bank as to his position. He made one statement in 1880 and another in 1883. He omitted liabilities to the extent of 10,000*l.* in 1880, and in the statement in 1883 he omitted liabilities to the extent of 17,000*l.* Now, in that—although he has not been convicted of any offences—his conduct touches very closely upon the misdemeanor “if in incurring any debt or liability he has obtained credit under false pretences” specified in the Debtors Act. But the case is not confined to that Act of 1869. It comes also under the Bankruptcy Act of 1883. We have to take into account the report of the official receiver. The intention of the Act is that a

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person in business shall keep the usual and proper books of account—that is, the proper books for the business. This bankrupt went in direct violation to this. The set of books which the bankrupt kept were certainly not fit and proper to disclose his business transactions. The devices made use of for the purpose of throwing dust into the eyes of creditors are innumerable, and in my opinion the legislature intended that this provision should be strictly adhered to. Then, it seems clear that the bankrupt knew he was insolvent during at least eight years. The case was ably argued upon the ground that some offences had been committed and that some conditions to the discharge ought to be imposed short of absolute refusal. The case was most ably put before us for that purpose. But the bankrupt must have known that year by year he was getting deeper into debt. It was also said that there is no case where a discharge had been absolutely refused for such offences as these. That may or may not be. I myself know of no case, but if ever there was a case which could possibly justify an absolute refusal, this is one. The law was passed for the express purpose of preventing conduct such as that which is before us. I am clearly of opinion, therefore, that the decision of the County Court judge was right, and the appeal must be dismissed with costs.

CAVE, J. :

I am of the same opinion. In considering this case we are bound to have regard not to the interests of the bankrupt or of the creditors alone, but also the interests of the public. We are bound to consider the interests of commercial morality. Looking at the case from this point of view, it is clear that the decision of the County Court judge was right. The governing section is section 28 of the Bankruptcy Act, 1883, which gives to the Court a discretion to be exercised with reference to a discharge when the bankrupt has been guilty of certain offences. Some of those offences may be of less grade than others, and if a bankrupt has committed them, his discharge may fairly be granted on some conditions. Here it is remarkable that the bankrupt appears to have committed all the offences specified in the section, and if we allow this bankrupt to have his discharge under conditions I can see no

conceivable case in which the discharge can possibly be refused. This is not a young man—he is 65 years old—and he has been long in business. In the year 1873 he compounded with his creditors, and then paid 1s. 6d. in the pound. He continued to carry on business as an auctioneer and valuer and also as a farmer. In 1876 he was insolvent. From 1876 he knew he was insolvent, and notwithstanding this, from 1876 to 1884 he continued to trade, getting deeper and deeper involved. That is an offence under section 28. A man who finds himself insolvent ought not to continue to trade in the hope of righting himself. He is not carrying on business at his own risk, but at the risk of innocent persons who know nothing about his condition. Again, this man has clearly not kept proper books, and on that point I entirely agree with what my brother MANISTY has said. There are certainly sales of stock which are not entered in the books, and when it is a debtor's desire to defraud his creditors his favourite plan is not to keep proper books. Then there is the further charge under subsection 3 (h), with regard to fraud and fraudulent breach of trust. Here certainly the bankrupt has been guilty both of fraud and fraudulent breach of trust. There is no answer whatever to the charge brought against him by Mr. *Smith*. Mr. *Smith* was without doubt favourably disposed towards the bankrupt, but in my opinion it is a very bad case indeed. The bankrupt was a trustee for his sister and her children. He being an auctioneer sold certain property which realised £1,700. He kept this money. Eventually, it is true he did hand over £500, but the remaining £1,200 has never been paid, and a more scandalous breach of trust, I cannot imagine. Added to what I have already referred to, there is the debtor's statements to the bank. Both were false. The second shows an improvement in circumstances palpably untrue, and it was made beyond all doubt in order to induce the bank to give further credit. The whole thing discloses a method of trading inconsistent with trading morality and it ought to be stopped. As I have said, this is not the case of a young man—it is not a first slip—and after committing all these scandals, this bankrupt has the impudence to come here and ask us to reverse the decision of the County Court judge. I see no ground whatever for doing so.

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It was the duty of the County Court judge to do what he did, and the appeal must be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors: *Carr & Sons*, for the debtor Badcock.

*Challoner & Co.*, for the trustee in the bankruptcy.

*W. W. Aldridge*, for the official receiver.

## PRACTICE.

DIVISIONAL  
 COURT.

BEFORE  
 MANISTY, J.  
 and  
 CAVE, J.  
 1886.

May 6th.

IN RE WATKINS, EX PARTE WATKINS.

*Bankruptcy Appeals (County Courts) Act, 1884, section (2).*

*Judgment Summons—Order of Committal—Debtors Act, 1869, section 5—Appeal to Divisional Court in Bankruptcy—Preliminary Objection.*

The Judge of a County Court not having jurisdiction in bankruptcy made an order of committal against the appellant upon a judgment summons under section 5 of the Debtors Act, 1869.

The judgment summons having by mistake been marked with the words "In bankruptcy," an appeal was brought to this Divisional Court.

*Held*: That no appeal could lie from the order complained of, at any rate to the Divisional Court in Bankruptcy.

*Quære*: Whether any appeal lies from a committal in the County Court under section 5.

THIS was an appeal on behalf of one *Watkins* against an order of committal made against him by the learned judge of the Williton County Court under section 5 of the Debtors Act, 1869.

In the year 1873, a petition was presented to the Divorce Court by the wife of the appellant for a divorce, and in 1876 a decree absolute was made with permanent alimony of 200*l.* per annum.

Subsequently an order was obtained by consent to reduce that amount to 80*l.* per annum in consideration of the husband

allowing and assigning over certain Irish property brought to him by his wife upon their marriage.

For the last five years, however, this alimony had not been paid, the sum of 418*l.* being in all due to the wife.

A judgment summons under section 5 of the Debtors Act was in consequence issued in the Williton County Court, upon which the learned judge made an order of committal, staying it for a month.

From this order the debtor now appealed to the Divisional Court sitting in bankruptcy.

*Thorne*, for the debtor.

*Herbert Reed*, for the wife.

*Herbert Reed* :

I have a preliminary objection. This is not an appeal in bankruptcy at all. The Williton County Court has no jurisdiction in bankruptcy, and therefore his Honour sitting there could not, and, in fact, did not, make an order in bankruptcy. The order appealed from was made under section 5 of the Debtors Act, 1869. There appears to be no appeal from a committal in the County Court under section 5. All appeals from County Courts not having bankruptcy jurisdiction are entered at the Crown Office, and we are informed by the Master of that office that he has no power to allow an appeal to be entered from such an order as this. Certainly there is no appeal in bankruptcy. There seems to have been some mistake from the fact that the judgment summons had by accident the words "in bankruptcy" written upon it. But those words being on it could not give the judge bankruptcy jurisdiction, and no objection was taken at the hearing of the summons. It is quite clear that the judge dealt with it as an ordinary judgment summons of a County Court under section 5. I submit therefore that the appeal is bad.

*Thorne* :

The judgment summons was headed in bankruptcy, and there-

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fore we come to the Divisional Court in bankruptcy. At any rate, it would be only fair for each side to pay their own costs.

MANISTY, J. :

Judgment.

I am of opinion that no appeal lies at any rate to this Court, and this appeal must therefore be dismissed with costs.

CAVE, J. :

I am of the same opinion.

*Appeal dismissed with costs.*

Solicitors : *Bolton, Robbins, Busk & Co.*, for the appellant.  
*Bordman & Co.*, for the wife.



DIVISIONAL  
 COURT.

BEFORE  
 MANISTY, J.  
 and  
 CAVE, J.  
 1886.  
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 May 6th.

IN RE LANE, EX PARTE HILL.

*Bill of Sale—Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), section 10—Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), sections 4 and 11—Validity of Bill of Sale—Description of Goods—Omission of Place where Goods situate.*

*Held* : That a bill of sale is not void under the Bills of Sale Act, 1882, although it may omit to specify the *locus* or place at which the goods assigned are situate.

THIS was an appeal from an order of the learned judge of the Brentford County Court setting aside a bill of sale given by the debtor, and bearing date, February 20th, 1885, on the ground that "the situation or *locus in quo* of the furniture and effects assigned by the said bill of sale was not stated in the bill of sale, or in the schedule, or in the affidavit filed at the time of the registration of such bill of sale."

The bill of sale in question was made in the form given in the Bills of Sale Act. The schedule described the goods, but, except as to a few articles, did not state where they were. The affidavit filed described the grantor as being of four different places.

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An application made by the official receiver as trustee to set aside the bill of sale on the ground that, as to the greater part of the goods, the place where they were was not described, was granted by the County Court judge.

From this decision, Mr. Hill, the bill of sale holder, now appealed.

*H. Kisch* for the bill of sale holder :

The question is whether the bill of sale is bad because the *locus in quo* was not stated. The solicitor copied the form in the Act. It is now said that is wrong. There is no Act of Parliament or authority requiring the *locus in quo* to be stated. Section 4 of the Bills of Sale Act, 1882, provides that "Every bill of sale shall have annexed thereto or written thereon a schedule containing an inventory of the personal chattels comprised in the bill of sale ; and such bill of sale, save as hereinafter mentioned, shall have effect only in respect of the personal chattels specifically described in the said schedule : and shall be void, except as against the grantor, in respect of any personal chattels not so specifically described." Specific description of chattels has nothing to do with the *locus in quo*. In the case of *Roberts v. Roberts* (L. R. 13 Q. B. D. 804), the Master of the Rolls said "I think that 'specific description' means an inventory." It is clear that the *locus in quo* is nowhere contemplated. Then as to the affidavit, section 11 provides that "Where the affidavit (which under section 10 of the principal Act is required to accompany a bill of sale when presented for registration) describes the residence of the person making or giving the same or of the person against whom the process is issued to be in some place outside the London bankruptcy district as defined by the Bankruptcy Act, 1869, or where the bill of sale describes the chattels enumerated therein as being in some place outside the said London bankruptcy district, the registrar under the principal Act

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shall forthwith and within three clear days after registration in the principal registry, and in accordance with the prescribed directions, transmit an abstract in the prescribed form of the contents of such bill of sale to the County Court registrar in whose district such places are situate, and if such places are in the districts of different registrars to each such registrar. Every abstract so transmitted shall be filed, kept, and indexed by the registrar of the County Court in the prescribed manner, and any person may search, inspect, make extracts from, and obtain copies of the abstract so registered in the like manner and upon the like terms as to payment or otherwise, as near as may be as in the case of bills of sale registered by the registrar under the principal Act." The affidavit here did describe the residences. No creditor could be in any way prejudiced. But it is upon this section that the County Court judge was influenced in setting aside this bill of sale. The words of the section certainly do not enact that the *locus in quo* must be stated, but it is suggested that it is thus inferred. The section is not an enacting section; it is one pointing out the duties of an officer. (Counsel referred to the cases of *Ex parte M'Hattie*, *In re Wood*, L. R. 10 Ch. Div. 398; 43 L. J. Bank. 26; 39 L. T. 373; *Ex parte National Mercantile Bank*, *In re Haynes*, L. R. 15 Ch. Div. 42; 49 L. J. Bank. 62; 43 L. T. 96.) It is for the other side to show that in a bill of sale or in the schedule or affidavit the *locus in quo* must be stated.

*Cooper Wyld* for the official receiver as trustee:

It is imperative that the *locus in quo* should be set out. I wish to call attention to this bill of sale. The grantor is described as having four residences. He is described as of Gresham Street, of Hampton, of Norbiton, and of Elgin House, South Acton. There is no description in the schedule of the place where the house furniture is, but there is a description of goods in the laundry at Norbiton and also at South Acton. All the decisions say that the *locus* should be specifically set out. The object is that the public may know whether the goods are covered by a bill of sale.

[CAVE, J.: You must show something in the Act of Parliament



which specifically or by inference directs that the *locus in quo* must be mentioned.]

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IN RE  
LANE,  
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HILL.

Section 11 certainly contemplates a description of some place where the goods are. If not the latter portion of the section is really inoperative.

MANISTY, J. :

I am of opinion that the decision of the County Court judge in Judgment this case must be reversed. The question is whether in a bill of sale since 1882 the place where the goods are, which are the subject of the bill of sale, must be stated. In this case the grantor describes himself as of four places: of Gresham Street, of Hampton, of Norbiton, and of Elgin House, South Acton. The schedule states things in different rooms without saying where: then it states things in the laundry at Norbiton; and also goods in the laundry at South Acton. In the case of two sets of goods, therefore, there is a statement where the goods are, and so if the bill of sale was void as to the others it is good as to them, and the decision of the County Court judge was so far wrong. But I go further, and I am of opinion that the decision was wrong *in toto*. The object of the Act was to enable a person who is about to have dealings with another person to see whether such person has given a bill of sale over his goods. All the legislature meant was that the grantor should register the sale of his goods and chattels if he gave a bill of sale. That was simply in order that a person about to have dealings with him may know if the intending debtor is free from liability. That is the main object of the Act, and it is carried out by the schedule giving the residence of the grantor. I am of opinion, therefore, that the decision of the County Court judge was wrong and must be reversed.

CAVE, J. :

I am of the same opinion. Section 9 of the Bills of Sale Act, 1882, is in these words:—"A bill of sale made or given by way of security for the payment of money by the grantor thereof, shall be void unless made in accordance with the form in the schedule to this Act annexed." The bill of sale here was made in the form

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prescribed, and that form is this, that the grantor assigns unto the grantee "all and singular the several chattels and things specifically described in the schedule hereto annexed." Now specific description means description as to species, and in this case that has been done. But it is said that the place where the goods are must also be stated. The residence and place of business of the borrower have been given in the affidavit, and one would naturally suppose that the goods would be in one of those. But I do not rely on that only. There is no enactment whatever which says that the bill of sale must state the place at which the goods are. All that is said is that the goods shall be specifically described, that is, described as to their species. It is now argued indeed, that if we look at section 11 of the Act, that section shows the place must be stated, and a bill of sale will be void if that is not done. I protest against such a construction of the section, which only states that where the bill of sale does give a description of the place at which the goods comprised in it are, then in certain cases certain things are to be done. In my opinion it would be monstrous, where the Act gives the form and says that a bill of sale shall be void unless made in accordance with that form, that the lender must also spell through all the Act to see if there be something else which may not perchance make the bill of sale void. There is nothing in the section to say that if the place where the goods are is not described, the bill of sale shall be void, and it would be in my opinion most mischievous if the lender has to spell out the act of parliament to gather that which is not enacted, but which is now said to be implied. If that be so, it would have been far kinder and fairer of the legislature to say at once that henceforth no bill of sale shall be valid under any circumstances whatever. This appeal will be allowed with costs.

*Appeal allowed with costs.*

Solicitors: *Young*, for the bill of sale holder.

*Woodbridge & Sons*, for the official receiver as trustee.

Cases relied upon and referred to:—

*Roberts v. Roberts*, L. R. 13 Q. B. D. 804.

*Ex parte M'Hattie, In re Wood*, L. R. 10 Ch. Div. 398; 43 L. J. Bank. 26; 39 L. T. 373.

*Ex parte National Mercantile Bank, In re Haynes*, L. R. 15 Ch. Div. 42; 49 L. J. Bank. 62; 43 L. T. 36.

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### IN RE CLEMENT, EX PARTE GOAS.

*Bankruptcy Act, 1883, section 4, sub-section 1 (g), and section 7.*

*Construction of Document—Deed of Arrangement—Failure of Debtor to comply with terms of Deed—Bankruptcy Petition.*

*Held*: That it is a general good rule of construction that where, if nothing were said, there would be a general applied condition, if there is inserted in a document a specific and limited condition, such specific and limited condition was meant to take the place of the general condition.

Thus, where a deed of arrangement, by which a debtor agreed to pay his creditors their debts in full by certain quarterly instalments, contained a clause that if default be made for the space of twenty-one days in paying any one instalment, then, and in such case, it should be lawful for the trustee under the deed by notice in writing to declare such deed void, "and in such event the creditors shall be entitled to enforce their claims as if the said deed had never been made or executed."

*Held*: That the trustee not having given the said notice, a creditor under the deed was not entitled to serve a bankruptcy notice and present a petition on account of the debt due to him."

COURT OF  
APPEAL  
BEFORE THE  
MASTER OF  
THE ROLLS,  
BOWEN, L.J.,  
and  
FRY, L.J.  
1886.  
May 7th.

THIS was an appeal on behalf of *C. Goas* from an order of Mr. Registrar Giffard, dismissing a bankruptcy petition presented against one *Lewis Clement*.

In December, 1883, *Goas* obtained judgment against *Clement* for the sum of 68*l*.

On December 11th, 1883, *Clement* being unable to pay his debts, called a meeting of his creditors, and stated his position and affairs to them.

At such meeting it was proposed that the debtor should pay his creditors in full on having time to do so, and that he should pay

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50*l.* a quarter until all his debts were paid, which proposal was accepted.

These terms were embodied in a deed dated December 11th, 1883, as follows:—"Whereas the said *Lewis Clement*, being unable to pay at the present time his debts in full, and wishing to pay the same by instalments, called a meeting of his creditors at the office of Mr. *J. J. Chapman*, 4, Gray's Inn Square, in the County of Middlesex, solicitor, and such meeting was held on Tuesday, the 11th day of December, 1883, when it was resolved that the said *Lewis Clement* should pay his debts in full by quarterly instalments of 50*l.*, and that to secure the payment of such quarterly sum, the security as hereinafter mentioned of the said *Frederick Hannaford*, the proprietor of *Wildfowler's Illustrated Shooting Times, Sports and Kennel News* (of which paper the said *Lewis Clement* is editor), should be accepted, and it was also resolved that the said *Charles Richard Steele* should be appointed trustee for the purpose of receiving such quarterly sum of 50*l.*, and dividing the same rateably amongst the creditors, until the whole amount of their debts should be paid and satisfied.

"And whereas the said *Charles Richard Steele* as such trustee hath approved of these presents as a proper deed for carrying out the aforesaid resolutions.

"Now this indenture witnesseth and declares as follows, namely:—

"(1.) The creditors of the said *Lewis Clement* hereby promise and agree to give such time to the said *Lewis Clement* to pay to them their debts as may be requisite and necessary, on the terms of this deed being carried out by him and the said *Frederick Hannaford*.

"(2.) The said *Lewis Clement* hereby agrees to pay to the said *Charles Richard Steele* the sum of 50*l.* quarterly, until his reasonable and proper charges and expenses in carrying out the trusts of this deed, and the whole of the debts due to the creditors shall be paid and satisfied in full, the first payment to be made on the 11th day of March, 1884, and the others at regular periods of three months, dating from the last mentioned date.

"(3.) The said *Charles Richard Steele* hereby undertakes

and agrees to receive the said sum of 50*l.* quarterly, and after deducting therefrom his costs and charges to distribute the same rateably from time to time amongst the creditors of the said *Lewis Clement*, until the whole of such debts shall be paid in full.

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\* \* \* \* \*

“(7.) If default be made for the space of twenty-one days in paying any one instalment, or the amount of such profit, then and in such case it shall be lawful for the said *Charles Richard Steele* by notice in writing under his hand, sent by post to each of the persons parties hereto, declaring these presents to be void, and the same shall be void accordingly, and in such event the creditors shall be entitled to enforce their claims, and as if this deed had never been made or executed.”

This deed was duly executed, but the 50*l.* a quarter was not paid.

A bankruptcy notice was consequently issued by *Goas* under section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, requiring payment of the judgment debt, upon non-compliance with which a petition was presented.

At the hearing of this petition the objection was raised on behalf of the debtor that by clause 7 of the deed the trustee alone was entitled to declare the deed void, and in that event only were the creditors to be remitted to their former rights.

The registrar dismissed the petition, with costs, and from this decision *Goas* now appealed.

*F. C. Willis* for Mr. *Goas* the petitioning creditor :

Before the registrar the deed of arrangement was produced, and it was alleged that by it the petitioning creditor was not entitled to proceed. The question is, can Mr. *Goas* in spite of the deed present a petition? The debtor has not carried out the terms of the deed. The creditor simply agreed not to proceed on the debt if the debtor carried out the terms of the deed which he has not done. He ought to have paid 200*l.* a year. As a matter of fact since the deed was

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executed he has only paid altogether 170*l*. Clause 7 of the deed provides that if default is made for twenty-one days in the payment of any instalment, then it shall be lawful for the trustee by notice in writing to declare the deed void, and in such event the creditors shall be entitled to enforce their claims by action.

[THE MASTER OF THE ROLLS : Has *Steele* the trustee given notice ?]

He has not, but I want to make the deed void on the non-performance of *Clement* to pay. The words in the deed are "it shall be lawful" for the trustee to give notice. They are not he must. The clause is a clause permitting the trustee to get rid of his right, otherwise it is unnecessary. The creditor agreed with the debtor that he would give him time in case he signed the deed. The creditor would have been entitled to proceed without the notice. The clause was only inserted for the protection of the trustee himself.

*Dunham* : for the debtor *Lewis Clement* was not called upon.

THE MASTER OF THE ROLLS (LORD ESHER) :

Judgment.

I am of opinion that the whole of the deed must be read together. It is a general good rule of construction that, where if nothing were said there would be a general applied condition, if there is inserted a specific and limited condition, such specific and limited condition was meant to take the place of the general condition. I think that clause 7 of the deed is to be fulfilled and that has not been done. The appeal must therefore be dismissed with costs.

BOWEN, L.J. : I am of the same opinion.

FRY, L.J. : I agree.

*Appeal dismissed with costs.*

Solicitors : *Chester, Mayhew, Browne, & Griffiths*, for the petitioning creditor.

*J. J. Chapman*, for the debtor.

## IN RE KEELING, EX PARTE BLANCHETT.

*Bankruptcy Act, 1883, section 4, sub-section 1 (g).**Bankruptcy Notice—"Creditor" obtaining final Judgment—Assignee of Judgment Debt—Rules of the Supreme Court, 1883, Order XLII., Rule 23.*

*Held:* (1) That the assignee of a judgment debt is not "a creditor" who "has obtained a final judgment" against the judgment debtor within the meaning of section 4, sub-section 1 (g), of the Bankruptcy Act, 1883: and that such assignee is not entitled to issue a bankruptcy notice against the debtor in respect of the debt.

(2) That the words of the said sub-section cannot be extended further than to the personal representative of the creditor who has obtained the judgment: and that the decision of the Court of Appeal in the case of *In re Woodall, Ex parte Woodall* (see *ante*, Volume I., page 201; L. R. 13 Q. B. D. 479), did not go further than to such personal representative.

THIS was an appeal from an order of Mr. Registrar Hazlitt extending the time for complying with the terms of a bankruptcy notice issued against the debtor *Keeling* under section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, until after the trial of an action to be brought by the creditor.

Judgment had been obtained against the debtor *Keeling* by one *Lickorish* upon two bills of exchange of which he was the holder for value.

These judgments *Lickorish* subsequently assigned for value to *William Sarl*; and on January 24th, 1885, *William Sarl* made a further assignment to *Blanchett* the present appellant.

The judgment debt not being paid, *Blanchett* obtained leave under Order XLII. Rule 23 of the Rules of the Supreme Court, 1883, to issue execution, and on July 17th, 1885, issued a bankruptcy notice under section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, against the debtor.

On August 4th, 1885, *Keeling* applied to the Court to set aside such bankruptcy notice.

The registrar, however, did not accede to this, but he did extend the time for complying with the terms of the bankruptcy notice until after the trial of an action to be brought by the creditor.

From this decision *Blanchett* now appealed.

COURT OF  
APPEAL.  
BEFORE THE  
MASTER OF  
THE ROLLS,  
BOWEN, L.J.,  
and  
FRY, L.J.  
1886.  
May 7th  
and 8th.

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 IN RE  
 KEELING,  
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 BLANCHETT.

Section 4, sub-section 1, provides that a debtor commits an act of bankruptcy \* \* \* (g) "If a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him in England, or, by leave of the Court, elsewhere, a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the Court that he has a counter-claim, set-off, or cross-demand, which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained."

*E. Cooper Willis, Q.C. (Ringwood with him)*: for the appellant Blanchett, stated the facts.

[BOWEN, L.J. : Does that sub-section 1 (g) apply to an assignee of a creditor? Have you any authority to show that an assignee of a judgment may get execution in a summary way?].

By Order XLII. Rule 23 of the Rules of the Supreme Court, 1883, it is provided that "In the following cases, viz.: (a) Where six years have elapsed since the judgment or date of the order, or any change has taken place by death or otherwise in the parties entitled or liable to execution: (b) Where a husband is entitled or liable to execution upon a judgment or order for or against a wife: (c) Where a party is entitled to execution upon a judgment of assets *in futuro*: (d) Where a party is entitled to execution against any of the shareholders of a joint stock company upon a judgment recorded against such company, or against a public officer or other person representing such company; —, the party alleging himself to be entitled to execution may apply to the Court or a Judge for leave to issue execution accordingly. And such Court or Judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue



or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried. And in either case such Court or Judge may impose such terms as to costs or otherwise as shall be just."

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[BOWEN, L.J.: Does that rule apply to an assignee? And further, does section 4, sub-section 1 (g), of the Bankruptcy Act give a person power to serve a bankruptcy notice on a judgment which he has not obtained?]

In the case of *In re Woodall, Ex parte Woodall* (see *ante*, Volume I. page 201; L. R. 13 Q. B. D. 479), the question was raised whether the party who served the bankruptcy notice was a creditor within this section. In that case the final judgment was obtained by one *Houlston*, who died. The petitioning creditor was his executrix; and the receiving order was made on the assumption that she, as executrix, could stand in the place of the creditor. The objection was taken that inasmuch as the petitioner was not the person who obtained final judgment, but the executrix, it was necessary that she should have obtained leave to issue execution under Rule 23 of Order XLII., and on that ground the appeal was allowed. In his judgment, Lord Justice BAGGALLAY said, " \* \* \* It was contended on the other hand, that in section 4, sub-section 1 (g), the word 'creditor' is equivalent to 'creditor or his representatives,' whoever they may be. If it were not for the words 'execution thereon not having been stayed,' which are inserted in section 4, sub-section 1 (g), I think the latter argument would be an extremely strong one. But, looking at those words, I have come to the opinion that the provision clearly intends a person who is entitled and in a position to issue execution. The original creditor was in that position. But if an applicant for a bankruptcy notice is the executor of the original creditor, he is not in that position until he has obtained leave to issue execution under Order XLII. Here the executrix had not secured the required permission \* \* \* ." So also Lord Justice COTTON said, " \* \* \* Then regard must also be had to the words, 'execution thereon not having been stayed.' The person who has done the two things must be in a position to issue

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execution. In the present case the executrix had not obtained final judgment, and she was not in a position to issue execution. But she could, under Order XLII., obtain leave to do so. The proper course is for the executrix to get an order, which would put her in a position to say she can issue execution. She will then, in my opinion, be a creditor within the meaning of section 4, sub-section 1 (g), and will be entitled to serve the notice." And Lord Justice LINDLEY said, " \* \* \* Until an executor has obtained leave to issue execution under Order XLII., it is impossible for such executor to say he has complied with the provisions of section 4, sub-section 1 (g). The executor has not obtained final judgment; but, by doing something else, he may put himself in the same position as a creditor who has obtained final judgment. If he has not done so, then the words, 'and execution thereon not having been stayed,' show clearly the creditor is intended to be a creditor who is in the position to issue execution."

[BOWEN, L.J.: There is a vast distinction between an executrix and the question of an assignee. The executrix has merely to prove the will: there may be an action in the case of an assignee.]

[THE MASTER OF THE ROLLS: It is obvious that under section 4, sub-section 1 (g), *Blanchett* was not a person who had obtained judgment. The question is, ought we to stretch the section further than the Court appears to have done in the case of *In re Woodall* ?]

The order giving leave under Order XLII. stands as an order here. Such order having been granted giving leave to issue execution, it ought to be taken to be rightly granted. The registrar does not say that the bankruptcy notice was improperly issued.

[THE MASTER OF THE ROLLS: Assuming that you could rightly get an order under the Judicature Acts, is this a case within the Bankruptcy Act ?]

Sub-section 1 (g) of section 4 takes the place of the old debtors

summons, to put an end to the delay and abuse which formerly existed.

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[THE MASTER OF THE ROLLS: The Act says, "If a creditor has obtained a final judgment." You want to read it, "If a person who is not a creditor has got hold of a judgment."]

*Winslow, Q.C. (Herbert Reed and Winslow with him):* for the debtor.

It is true that some strong expressions were apparently used in *In re Woodall*, but it is to be noticed that in that case Lord Justice COTTON said, "The act of bankruptcy in question is a statutory one, and it is necessary to look closely at the terms of section 4, sub-section 1 (g). The creditor must do two things: (1) he must obtain a final judgment; (2) he must serve a notice on the debtor. The same person must do both." The words in the section "counterclaim, set-off, or cross demand" apply to an executor, but they do not apply to an assignee.

*May 8th.*

THE MASTER OF THE ROLLS (LORD ESHER):

In this case a person had obtained judgment against the debtor Judgment. upon two bills of exchange. After that person had obtained judgment, he assigned the judgment to another person, who further assigned to the present appellant. Thereupon the appellant having the judgment so assigned issued a notice under the Bankruptcy Act which the debtor applied to have set aside. The registrar declined to set such bankruptcy notice aside, but he did order the matter to be adjourned, and extended the time allowed for compliance with the bankruptcy notice until after the trial of an action to be brought by the creditor. The question now is whether the appellant who so issued the bankruptcy notice is entitled to do so under section 4, sub-section 1 (g), of the Bankruptcy Act, 1883. The words of section 4, sub-section 1 (g), are—"If a creditor has obtained a final judgment, &c." The question is, therefore, whether this appellant is a creditor who has obtained a final judgment within the Act. That he is the creditor who has

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obtained judgment cannot be said. But it is suggested that the words may be enlarged, and by way of authority the case of *In re Woodall, Ex parte Woodall* (see *ante*, Vol. I., p. 201 : L. R. 13 Q. B. D. 479) was cited. Now in that case it is true the Court of Appeal did so far enlarge the section as to apply to the executrix of the person who had obtained the judgment, and it is said that if the Court extended it for that purpose so it may extend it further. Certain words in the judgments in the case were relied upon to prove this. But treating the judgments then given as authority in the manner in which they ought to be treated, that is looking not on the facts but on the principle upon which those judgments were given, I think the intention was to limit the case to that of a personal representative. I think the Court of Appeal decided that case upon the principle that the personal representative might formerly be made a party to the record, and that the judges meant to go no further. I am of opinion that it would be extremely dangerous to go further, and I have taken the opportunity of speaking to the judges who formed the Court on the occasion when *In re Woodall* was heard. I may say that I have the authority of those other judges to express their opinion, also that the section does not go beyond that case. Therefore the appellant here is not within the words. The registrar had no authority to do even what he did. He ought to have set aside the bankruptcy notice at once. The proper order for the registrar to make was one setting aside the notice, and we make that order now.

BOWEN, L.J. :

I am of the same opinion. The question is whether the appellant here comes within the meaning of section 4, sub-section 1 (g), of the Bankruptcy Act, 1883, as being a creditor who has obtained final judgment against the debtor. The appellant alleges that he is the assignee of the person who has obtained judgment, and so is entitled to everything that the judgment creditor would be entitled to. Now it is necessary to consider what class of statute it is which we have to define. We must not give a liberal interpretation to a section of a penal kind. Under the provisions of the Act of 1869 there were many abuses. Under this Act of 1883, in

the place of a debtor's summons, a creditor is only entitled to treat as an act of bankruptcy a claim which he has prosecuted to judgment, and upon which he may issue execution. I am of opinion that it ought to be strictly contended that only those creditors, or the representatives of those creditors who have prosecuted their right to determination, are the persons entitled to take advantage of section 4, sub-section 1 (g), of the Act, and to issue a bankruptcy notice. I am glad to find that the whole Court of Appeal takes this view.

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FRY, L.J. :

I am of the same opinion. I think that the creditor who has obtained the final judgment must also serve the bankruptcy notice. There are many reasons why this should be. Otherwise various difficulties may arise which cannot arise if the same person does both these acts. That was evidently the view taken by the Court of Appeal in *In re Woodall*. Lord Justice COTTON said, "The creditor must do two things: (1) he must obtain a final judgment; (2) he must serve a notice on the debtor. The same person must do both." In this case the same person has not done both. In the case of *In re Woodall* it is true that strictly and physically the same person did not do both things, but it is reasonable to hold that the legal personal representative stands in the same place as the judgment creditor. The same observation cannot apply to the assignee of a judgment.

*Appeal dismissed with costs.*

Solicitors : *C. E. R. Preston*, for the appellant.

*Munns and Longden*, for the debtor.

Case relied upon :

*In re Woodall*, *Ex parte Woodall*, see *ante*, Volume I., page 201 ; L. R. 13 Q. B. D. 479.

## PRACTICE.

BEFORE  
MR. JUSTICE  
CAVE.  
1886.  
May 11th.

IN RE VOGHT, EX PARTE SPAMER.

*Bankruptcy Rules, 1883, Rule 173.*

*Bankruptcy Act, 1883, Schedule 2, Rule 23.*

*Proof—Rejection by Trustee—Time—Motion to Expunge.*

Where on an appeal from the rejection of a proof by the trustee the objection is taken that such rejection was not made within the fourteen days required by Rule 173 of the Bankruptcy Rules, 1883, the Court will allow such objection, but will treat the application as a motion to expunge the proof on behalf of the trustee, and will deal with the case accordingly.

The case of *In re Sissling, Ex parte Fenton* (see *ante*, Volume II. page 289), followed.

THIS was an appeal against the rejection by the trustee in the bankruptcy of the proof of debt of one *Otto Spamer* of Leipsic.

On December 12th, 1885, the proof in question was made by *Mr. Selim*, the solicitor acting for the creditor *Spamer*, under a power of attorney dated December 10th, 1885.

On March 22nd, 1886, the trustee rejected the proof on the ground that the affidavit of debt did not show sufficient knowledge.

From this decision *Spamer* now appealed.

*F. C. Willis*: for Mr. Spamer:

I have first of all a preliminary objection to the trustee's rejection under Rule 173 of the Bankruptcy Rules, 1883. Rule 173 provides that, "Subject to the power of the Court to extend the time, the trustee, within fourteen days after receiving a proof, shall in writing either admit or reject it wholly or in part, or require further evidence in support of it." Here the trustee received the proof of debt on December 12th, 1885, and it was not until March 22nd, 1886, that he rejected it. If the trustee does not reject within the proper time his only course is to move to expunge.

*Sidney Woolf*: for the trustee in the bankruptcy:

I cannot deny what has been said. I ask your Lordship to

follow the opinion you expressed in the case of *In re Sissling, Ex parte Fenton* (see *ante*, Volume II., page 289), and to treat this case as a motion on behalf of the trustee to expunge the proof. Your Lordship then said, “\* \* \* the trustee might, under Rule 28 of Schedule 2 of the Bankruptcy Act, 1883, apply to have the proof expunged at any time. The result would simply have been a subsequent application by the trustee for this purpose. The parties were fighting about nothing, and the Registrar might have told them so, and have treated the case as a motion on behalf of the trustee to expunge the proof. I do not think he ought to have sent the parties away on a mere technicality.”

1886.  
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 IN RE  
 VOOGHT,  
 EX PARTE  
 SPAMER.

CAVE, J. :

I will treat this case as an application to expunge, and now, Mr. Woolf, it is for you to go on with your motion.

*The case was ultimately adjourned for further evidence until after the learned Judge's return from circuit.*

Solicitors : *A. Selim*, for Mr. Spamer.

*Lindo & Co.*, for the trustee in the bankruptcy.

Case relied upon :

*In re Sissling, Ex parte Fenton*, see *ante*, Volume II., page 289.



## PRACTICE.

COURT OF  
APPEAL.

BEFORE THE  
MASTER OF  
THE ROLLS,  
BOWEN, L.J.

and  
FRY, L.J.  
1886.

May 21st.

IN RE TENNANT, EX PARTE GRIMWADE.

*Bankruptcy Act, 1883, section 4, sub-section 1 (g).*

*"Final Judgment"—Winding-up of Company—"Balance Order."*

*Held:* That a "balance order" for the payment of calls upon shares, made on a contributory in the winding-up of a company, is not a "final judgment" within the meaning of section 4, sub-section 1 (g), of the Bankruptcy Act, 1883, so as to enable the liquidator of the company to issue a bankruptcy notice against the contributory in respect of the amount ordered by the balance order to be paid.

The case of *In re Sanders, Ex parte Whinney* (see *ante*, Volume I. page 185 ; L. R. 13 Q. B. D. 476), approved and followed.

THIS was an appeal on behalf of *W. L. Grimwade*, official liquidator of Messrs. H. Chalk, Webb & Co., from an order of the Registrar setting aside a bankruptcy notice against *R. B. Tennant*.

The case raised the question whether a "balance order" for the payment of calls upon shares, made on a contributory in the winding-up of a Company was a "final judgment" within the meaning of section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, so that the liquidator of the company could issue a bankruptcy notice against the contributory in respect of the amount ordered by the balance order to be paid.

Section 4 deals with the cases in which a debtor commits an act of bankruptcy; and sub-section 1 (g) provides that a debtor commits an act of bankruptcy "If a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him in England, or, by leave of the Court, elsewhere, a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the



Court that he has a counter-claim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained."

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IN RE  
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EX PARTE  
GRIMWADE.

The Divisional Court in bankruptcy held in the case of *In re Sanders, Ex parte Whinney* (see *ante*, Volume I., page 185; L. R. 13 Q. B. D. 476), that a "balance order" is not a "final judgment" within the meaning of this section.

The Court of Appeal now approved and followed that decision.

*Herbert Reed*: for the official liquidator.

The Registrar really set aside this bankruptcy notice on the ground that the debtor had a set-off or cross-demand which equalled the amount of the debt. Against that decision this appeal was lodged. But I understand that my friend intends to take a point here to-day which was not taken in the Court below. I do not wish to waste the time of your Lordships, and I will refer to that point at once. The debt here was not a final judgment. It was in reality a balance order. In the case of *In re Sanders, Ex parte Whinney* (see *ante*, Volume I., page 185; L. R. 13 Q. B. D. 476), the Divisional Court sitting in bankruptcy held "That a 'balance order' made in the voluntary winding-up of a company, whereby a contributory was ordered to pay in to the liquidator certain calls made in respect of the said company before the commencement of the winding-up, is not a 'final judgment' within the meaning of section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, so as to support a bankruptcy notice." But it is a final proceeding:—

[BOWEN, L. J.: We have said before that the Bankruptcy Act must be construed strictly.]

In the case of *In re Faithfull, ex parte Moore* (see *ante*, Volume II., page 52; L. R. 14 Q. B. D. 627), Lord SELBORNE said, "To constitute an order a final judgment, nothing more is necessary than that there should be a proper *litis contestatio*, and a final adjudication between the parties to it on the merits." Moreover,

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 IN RE  
 TENNANT,  
 EX PARTE  
 GRIMWADE.

as I have said, this ground was not taken in the Court below. If it had been taken this appeal would not have been brought. At any rate I submit that if it is to be dismissed, it may be dismissed without costs.

*F. C. Willis* : for Mr. Tennant.

I ask for costs. I have quite as good a case on the point on which the Registrar acted as on this.

THE MASTER OF THE ROLLS (LORD ESHER) :

Judgment.

It seems to me that the Registrar ought to have seen that this was not a final judgment. I stand by the rule which I have before expressed that, when an objection is open, the judge is bound to see it even though counsel may not do so. That is one of the duties of a judge. The Divisional Court were in my opinion quite right in deciding in the case cited that a balance order is not a final judgment within the meaning of the section. This appeal must therefore be dismissed. The respondent is entitled to his costs ; and it must be dismissed with costs.

BOWEN, L.J., and FRY, L.J., concurred.

*Appeal dismissed with costs.*

Solicitors : *Beall & Co.*, for the official liquidator.

*W. Sweetland*, for Mr. Tennant.

Cases relied upon or referred to :—

*In re Sanders, Ex parte Whinney*, see *ante*, Volume I., page 185 ; L. R. 13 Q. B. D. 476.

*In re Faithfull, Ex parte Moore*, see *ante*, Volume II., page 52 ; L. R. 14 Q. B. D. 627.

**PRACTICE.****IN RE POSTLETHWAITE, EX PARTE LEDGER.***Bankruptcy Act, 1883, section 18.**Scheme of Arrangement—Approval of Court—Discretion of Registrar.*

On an appeal by the petitioning creditor from an order of the Court approving a scheme of arrangement put forward by the debtor, on the ground that by reason of the conduct of such debtor the Court, if he were adjudged bankrupt, would be required to refuse his discharge; or that, at any rate, such facts had been proved against him as would justify the Court in the case of bankruptcy in refusing, qualifying, or suspending the discharge.

*Held:* (1) That there was no evidence of any offence committed by the debtor which would under the Act require the Court to refuse the discharge.

(2) That the words of section 18, sub-section (6), of the Bankruptcy Act, 1883—"If any such facts are proved as would under this Act justify the Court in refusing, qualifying, or suspending the debtor's discharge, the Court may, in its discretion refuse to approve the composition or scheme"—show that in such case it is in the discretion of the Court whether it will refuse to approve a scheme or not: that all matters must be duly weighed by the Court and discretion exercised: and that the decision of the Court will not be set aside on appeal unless it is manifestly wrong.

COURT OF  
APPEAL.  
BEFORE THE  
LORD  
CHANCELLOR,  
THE  
MASTER OF  
THE ROLLS,  
and  
FRY, L.J.  
1886.  
May 28th.

**T**HIS was an appeal from a decision of Mr. Registrar Hazlitt, rescinding a receiving order made against the debtor *Postlethwaite*, and approving of a scheme of arrangement of the said debtor's affairs.

The debtor formerly carried on business as an engine and metal broker, and on August 15th, 1885, a receiving order was made against him on a creditor's petition presented by one *Ledger*.

A proposal for a scheme of arrangement of the debtor's affairs was subsequently put forward, which was accepted and confirmed by the statutory majority of the creditors, and was approved by the Court.

From this approval the petitioning creditor now appealed.

The ground of the appeal was that the debtor, if he had been adjudged bankrupt, would not have been entitled to his discharge;

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 IN RE  
 POSTLE-  
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 LEDGER.

or that his discharge would at any rate have been suspended; and that under those circumstances the Registrar was wrong in approving the scheme.

Section 18, sub-section (6) of the Bankruptcy Act, 1883, provides that "If the Court is of opinion that the terms of the composition or scheme are not reasonable, or are not calculated to benefit the general body of creditors, or in any case in which the Court is required under this Act where the debtor is adjudged bankrupt to refuse his discharge, the Court shall, or if any such facts are proved as would under this Act justify the Court in refusing, qualifying, or suspending the debtor's discharge, the Court may, in its discretion, refuse to approve the composition or scheme."

And section 28, which deals with the discharge of a bankrupt provides by sub-section (2) that "on the hearing of the application the Court shall take into consideration a report of the official receiver as to the bankrupt's conduct and affairs, and may either grant or refuse an absolute order of discharge, or suspend [the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property. Provided that the Court shall refuse the discharge in all cases where the bankrupt has committed any misdemeanor under this Act, or Part II. of the Debtors Act, 1869, or [any amendment thereof, and shall, on proof of any of the facts hereinafter mentioned, either refuse the order, or suspend the operation of the order for a specified time, or grant an order of discharge, subject to such conditions as aforesaid :—

(3) The facts hereinbefore referred to are—

(a.) That the bankrupt has omitted to keep such books of account as are usual and proper in the business carried on by him, and as sufficiently disclose his business

transactions, and financial position within the three years immediately preceding his bankruptcy :

- (b.) That the bankrupt has continued to trade after knowing himself to be insolvent :
- (c.) That the bankrupt has contracted any debt provable in the bankruptcy, without having at the time of contracting it any reasonable or probable ground of expectation (proof whereof shall lie on him) of being able to pay it :
- (d.) That the bankrupt has brought on his bankruptcy by rash and hazardous speculations or unjustifiable extravagance in living :
- (e.) That the bankrupt has put any of his creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against him :
- (f.) That the bankrupt has within three months preceding the date of the receiving order, when unable to pay his debts as they become due, given an undue preference to any of his creditors :
- (g.) That the bankrupt has on any previous occasion been adjudged bankrupt, or made a statutory composition or arrangement with his creditors :
- (h.) That the bankrupt has been guilty of any fraud or fraudulent breach of trust.

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 POSTLE-  
 THWAITE,  
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 LEDGER.

*Pyke* : for the appellant.

The offences which the evidence shows the debtor to have committed were—(1) that he continued to trade after knowing himself to be insolvent : and (2) that he contracted debts without any probable ground of expectation of being able to pay them.

[THE MASTER OF THE ROLLS : Those are cases in which the Court may exercise its discretion as to refusing to approve a scheme.]

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 IN RE  
 POSTLE-  
 THWAITE,  
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 LEDGER.

I go further, and I say that the evidence shows that the debtor has committed an offence under Part II. of the Debtors Act, 1869. He has brought himself within section 11, sub-section (15) of that Act, by pledging and disposing of otherwise than in the ordinary way of his trade, property which he had obtained on credit and had not paid for, within four months of his bankruptcy. The petitioning creditor presented his petition on July 28th, 1885. In the May previous, the debtor obtained from the petitioning creditor 2,900*l.* worth of iron. That iron he sent over to Dunkirk, to one *Ponsard*, who obtained an advance upon the iron, and remitted the proceeds to the debtor. The debtor was at that time in great difficulties. He sent to *Ponsard* for the purpose of an advance.

[FRY, L.J. You must make out that *Ponsard* was the agent of the debtor to pledge.]

[THE LORD CHANCELLOR. And you must point to some evidence which shows that the debtor did send the iron to *Ponsard* for the purpose of pledging it. I can see none.]

Then I say that the Registrar exercised his discretion wrongly in approving the scheme. The debtor continued to trade after knowing himself to be insolvent.

[THE MASTER OF THE ROLLS. With regard to that, you have first to show the debtor was insolvent, then that he continued to trade after he knew he was insolvent, and then that the Registrar was wrong in his discretion.]

In March, 1885, the debtor had not 50*l.* at his bankers.

[THE MASTER OF THE ROLLS. I find that up to June, 1885, the debtor paid in that year 17,000*l.* into his bankers. It is not the case of a man always drawing on his bankers and never paying in.]

*E. Cooper Willis, Q.C. (F. C. Willis with him):* for the respondent, were not called on.

THE LORD CHANCELLOR (LORD HERSCHELL) :

This is an appeal by the petitioning creditor against an order of the Court sanctioning a scheme of arrangement. It is contended that this scheme ought not to have been sanctioned because of the provisions of sub-section (6) of section 18 of the Bankruptcy Act, 1888, which provides that "If the Court is of opinion that the terms of the composition or scheme are not reasonable, or are not calculated to benefit the general body of creditors, or in any case in which the Court is required under this Act, where the debtor is adjudged bankrupt to refuse his discharge, the Court shall, or if any such facts are proved as would under this Act justify the Court in refusing, qualifying, or suspending the debtor's discharge, the Court may, in its discretion, refuse to approve the composition or scheme." It was contended first that the debtor in this case had brought himself within Part II. of the Debtors Act, 1869, and as in that case the Court must refuse the discharge if the debtor had been adjudged bankrupt, so the Registrar was wrong in approving this scheme of arrangement. The offence alleged was under section 11, sub-section (15) of the Debtors Act being that of pledging goods which he had purchased on credit, within four months of his bankruptcy. I am of opinion, however, that the appellant has altogether failed to show that any such offence has been committed. There is not even a *prima facie* case made out. Then it was said that the Registrar ought to have refused to approve the scheme under the following words in section 18, sub-section (6)—"if any such facts are proved as would under this Act justify the Court in refusing, qualifying or suspending the debtor's discharge, the Court may, in its discretion, refuse to approve the composition or scheme." Now those words are very different from the words which precede them. They assume that if facts are found which would justify the Court in refusing the discharge, the Court may in that case refuse to approve the scheme. But it is not bound to do so. In this case it was alleged that the debtor had traded after knowing himself to be insolvent. It is not enough to show that the debtor was insolvent, but also that he knew he was insolvent, and I am of opinion that has not been satisfactorily established here. Even if it had been, it is in the discretion of the Court whether it will refuse to approve a scheme. All matters must be duly weighed by the

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IN RE  
POSTLE-  
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LEDGER.

Judgment.

1886.  
IN RE  
POSTLE-  
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LEDGER.

Court and the discretion exercised, and this Court will certainly not set aside a discretion so exercised unless it is quite evident that such discretion was wrong. I certainly cannot say so in this case. The arrangement appears to me to be a favourable one for the creditors altogether, and this appeal must therefore be dismissed with costs.

THE MASTER OF THE ROLLS (LORD ESHER) :

I am of the same opinion. If the Registrar had decided in the other way this Court would not have interfered, and I am of opinion that we cannot interfere here.

FRY, L. J. : I agree.

*Appeal dismissed with costs.*

Solicitors : *Irvine & Hodges* for the petitioning creditor.

## PRACTICE.

COURT OF  
APPEAL.

BEFORE THE  
LORD

CHANCELLOR,  
THE MASTER

OF THE

ROLLS,

and

FRY, L. J.

1886.

May 28th.

IN RE WISE, EX PARTE ROWLAND.

*Bankruptcy Appeals (County Courts) Act, 1884, section (2).*

*Neglect of Registrar of County Court to carry out Order of Court of Appeal—  
Procedure to enforce obedience—Jurisdiction.*

*Held* : (1) That where an order is made by a Divisional Court in Bankruptcy on an appeal from a County Court and the Registrar of the County Court neglects or refuses to carry out such order, the Divisional Court has no original jurisdiction to make an order on the County Court Registrar directing him to do so.

(2) But where an order is made by a Divisional Court in Bankruptcy on an appeal from a County Court, the Registrar of the County Court ought to comply with such order forthwith, and has no right to refuse to comply with it until the time limited for appeal to the Court of Appeal has expired.

Thus, where the Divisional Court in Bankruptcy on an appeal from a



County Court allowed the appeal, and gave leave to the unsuccessful respondent to appeal to the Court of Appeal, but made an order directing moneys in Court to be paid out, which the Registrar of the County Court declined to do until the time limited for appeal to the Court of Appeal had expired, and an order was in consequence made by the Divisional Court directing him to pay out the moneys in question together with costs, from which order the Registrar appealed.

*Held*: That the Registrar had no right to refuse to pay out the said moneys, there having been no stay of proceedings under the order of the Divisional Court pending appeal.

But the Registrar was an officer of the County Court: the order of the Divisional Court upon the appeal from the County Court was to be carried out by the County Court: and the Divisional Court had no jurisdiction to make such an order against the Registrar.

1886.  
IN RE  
WISE,  
EX PARTE  
ROWLAND.

**T**HIS was an appeal on behalf of Mr. *Rowland*, the Registrar of the County Court at Croydon, from an order of the Divisional Court in Bankruptcy, directing him to pay out certain moneys paid into the said County Court, together with the costs of and occasioned by his refusal to make such payment.

The case in the Court below will be found reported, *ante*, p. 123.

On March 1st, 1886, the case of *In re Wise* was heard before Mr. Justice CAVE and Mr. Justice GRANTHAM, sitting as a Divisional Court in Bankruptcy, on an appeal from the Croydon County Court, when the decision given by the County Court was reversed.

Application was then made by the respondent to the appeal for leave to appeal to the Court of Appeal, which leave was given; but an order was nevertheless made that 450*l.* money in Court, should be paid out.

That order was drawn up on March 18th, but notwithstanding repeated applications made to him, the Registrar of the County Court declined to pay out the said sum of 450*l.* until the time allowed for an appeal to the Court of Appeal had expired.

On April 16th the case came on in due course for hearing in the Court of Appeal, when the decision of the Divisional Court was confirmed. The Registrar was informed the next day of this fact, and was again asked to pay out the money, but he declined to do so until he had seen the order of the Court of Appeal.

On April 19th, notice of motion in the Divisional Court was in consequence given, calling on the Registrar to show cause why he

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IN RE  
WINE,  
EX PARTE  
ROWLAND.

should not pay out the money at once ; and on April 21st the Divisional Court made an order that he should pay it out at once, and that he should also pay the costs of and occasioned by the application. (See *ante*, p. 123).

From this order the Registrar now appealed.

*Muir Mackenzie* (*Herbert Reed* with him) : for the Registrar.

The Registrar was not wrong in retaining the money, insomuch as it appears to be the settled practice in that Court not to pay out under an order until the expiration of the time limited for appealing from that order, and to treat an appeal as a stay of proceedings. He has been Registrar for eighteen years, and that has been his practice. But I go further, and I say that in any event the Divisional Court had no jurisdiction to make the order which it did make. Application ought to have been made to the judge of the County Court, whose officer the Registrar is in order to compel him to do his duty. The Divisional Court had no jurisdiction to make the order, the Registrar being an officer of the County Court, and having acted in what he had done in that capacity.

[THE MASTER OF THE ROLLS. You say that, assuming the Registrar was all wrong, the application now appealed against was made to the wrong Court.]

Yes. An original motion was made to the Divisional Court. The Divisional Court had not jurisdiction. (Counsel referred to the case of *In re Thomas, Ex parte the Comptroller in Bankruptcy*, see *ante*, p. 49 ; and to *Philips v. Philips*, L. R. 5 Q. B. D. 60).

*H. D. Greene, Q.C.* (*F. C. Willis* with him) : for the respondent.

This point was not taken in the Court below. The Registrar did not raise any objection to the jurisdiction of the Divisional Court. The appeal from the County Court was heard on March 1st, and a special application was made to the Divisional Court for leave to allow the money to remain in court pending appeal. The Divisional

Court imposed the condition that interest should be paid, and as that was refused, it made a peremptory order to pay out. The order then became the special order of the Divisional Court, and it had certainly jurisdiction to enforce its order. The Divisional Court had jurisdiction to punish contempt of its order.

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IN RE  
WISE,  
EX PARTE  
ROWLAND.

THE MASTER OF THE ROLLS (LORD ESHER):

The Chancellor being obliged to go to the House of Lords desires Judgment. me to say that his opinion of this case entirely coincides with mine. This is a bankruptcy case heard in a County Court. An appeal was taken to the Divisional Court, and thereupon the Divisional Court gave judgment that the settlement about which the dispute had arisen was good, and that certain money in the County Court should be paid out. On that being brought to the attention of the County Court registrar, the registrar took upon himself to say that, notwithstanding that order, he could hold the money until the time for appealing was out, and if an appeal was taken, then during the time of appeal, and until the order of the Court of Appeal was shown to him. Anything more absolutely wrong I cannot conceive. He had nothing to do but to obey the order, and he ought to have obeyed it. It is of no consequence what his conduct and practice has been for eighteen years. He was wrong, and he seems to have been doing wrong for eighteen years. But be it so. This is an order of a Court of Appeal, which is a direction to the Court appealed from. If an officer of the Court does wrong, can you come to the Court of Appeal to ask it to enforce its own order, and to enforce it against the officer of another Court? When the Court of Appeal has given judgment, it has nothing more to do with it. The judgment is to be taken as the judgment of the Court appealed from. The Court of Appeal has nothing to do with the carrying out of the judgment. As between the Court of Appeal and the County Court, it was the County Court which was doing wrong. The proper course was for the application to be made to the County Court judge. If the County Court judge had upheld the registrar, then an appeal would lie to the Divisional Court. As it was, the application was made to the wrong Court, and the appeal must therefore be allowed. I will say a word as to the question of costs immediately.

1880.  
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 IN RE  
 WISE,  
 EX PARTE  
 ROWLAND.

FRY, L.J. :

I entirely agree. I consider the conduct of the registrar to be highly worthy of blame. The way in which he has raised technical objections, and indeed his whole line of conduct is highly objectionable and worthy of censure. But that does not determine the case. The question is what jurisdiction the Divisional Court had. It has been contended that the Divisional Court had power to enforce their order by process of contempt. But the order of the Divisional Court was not an order upon the registrar. The order directed that the money should be paid out to the trustee of the settlement. If the trustee wished to enforce the order by process for contempt, he ought at least to have obtained a further order specifying the person by whom the payment was to be made. Here no supplemental order was obtained, and I am of opinion that the Divisional Court had no jurisdiction to make the order against the registrar.

THE MASTER OF THE ROLLS :

Now as to costs. We have already said what our opinion is of the conduct of the registrar. He submitted most humbly to the Divisional Court, and then he came to us here at once on appeal. We must allow the appeal, but it will be without costs either here or in the Divisional Court.

*Appeal allowed without costs.*

Solicitors : *J. E. Fox*, for Mr. Rowland.

*Clarkson, Greenwell, & Wyles*, for the respondent.

Cases referred to :—

*In re Thomas, Ex parte the Comptroller in Bankruptcy*, see ante, page 49.

*Philips v. Philips*, L. R. 5 Q. B. D. 60.

## IN RE SMITH, EX PARTE EDWARDS.

DIVISIONAL  
COURT.BEFORE  
POLLOCK, B.  
and  
CAVE, J.  
1886.*Bankruptcy Act, 1883, section 37, sub-section (3).**Proof—Order for Reference—Bankruptcy of Debtor before Award—Proof for Costs.*

June 22nd.

On July 15th, 1884, an order was made by consent by which all matters in dispute in an action were referred to arbitration, the costs to be in the discretion of the said arbitrator.

On November 15th, 1884, during the continuance of the arbitration proceedings, the defendant debtor became bankrupt, and on January 21st, 1885, the trustee in the bankruptcy wrote to the arbitrator as follows:—  
“I give you notice that I as trustee deny any agreement of reference or that any award therein is or will be binding on me, and so far as I have the power I revoke your authority.”

On February 26th, 1885, the arbitrator gave his decision, by which he awarded to the plaintiff in the action a certain sum, and ordered that all costs should be paid by the defendant.

A proof for the said costs having been rejected by the trustee in the bankruptcy and also by the County Court Judge.

*Held* (on appeal): That the bankruptcy did not operate as a revocation of the submission: that the trustee had no power to revoke the authority: and that the creditor was entitled to prove for the costs in question.

**T**HIS was an appeal from an order of the learned judge of the Liverpool County Court disallowing a proof by one *Edwards* in the bankruptcy of *Smith* in relation to the costs of a reference.

In the year 1884 *Edwards* issued a writ against *Smith*, by which he claimed a certain sum of money; and on July 15th, 1884, an order was made by consent by which all matters in dispute were referred to arbitration, all costs to be in the discretion of the said arbitrator.

Under this arbitration several meetings were held, but before any award was given, the debtor, on November 15th, 1884, filed his own petition, and a receiving order was made against him.

On January 21st, 1885, the arbitrator wrote to the trustee in the bankruptcy announcing a further sitting, to which the trustee replied as follows:—“I give you notice that I as trustee deny any agreement of reference or that any award therein is or will be binding on me, and so far as I have the power I revoke your authority.”

The arbitration, however, was continued, and on February 26th,

1886.  
IN RE  
SMITH,  
EX PARTE  
EDWARDS.

1885, an award was given by which it was held that the defendant was indebted to the plaintiff in the sum of 3,600*l.*, and also that the costs of the action and of the reference and award should be paid by the said defendant.

On March 31st, 1885, a proof was lodged by *Edwards* in the bankruptcy for 3,600*l.*, and a further proof for 600*l.* on account of the costs as above mentioned, including 126*l.* fees paid by him to the arbitrator.

The sum of 3,600*l.* was subsequently reduced to 2,600*l.* and allowed by the trustee, but the proof for the costs was rejected.

The County Court judge having upheld the trustee's rejection of the proof for the said costs, *Edwards* now appealed.

*E. Cooper Willis, Q.C. (MacConkie with him), for Mr. Edwards :*

It is argued that inasmuch as after the order of reference and after the reference had been in great part held, the debtor became bankrupt, Mr. *Edwards* was not entitled to prove for the costs of the reference. The question is (1) whether the bankruptcy would be a revocation of the order of reference; and then (2) whether, if there is a revocation, *Edwards* cannot prove as for damages. The County Court judge said that he was entitled to prove for 2,600*l.*, but that the proof for the 600*l.* could not be allowed. But the order referring having been made by consent was irrevocable. Under the old Bankruptcy Acts there would have been a liability which could have been enforced against the bankrupt, but the object of recent acts has been that claims like these should be proved in the bankruptcy and a debtor set free. If it had been under the old Acts the amount would not have been provable, but under the new Act it is. Now can there be a revocation of an order of the Court of this kind? In the case of *Andrews v. Palmer* (4 B. & Ald. 250), where a case was referred by order of *nisi prius*, and after the reference, but before the making of the award, the plaintiff became bankrupt; it was held that this was no revocation of the submission, and that the arbitrator having awarded a verdict for the defendant had done right.

And the Court said, "The bankruptcy did not operate as a revocation of the submission. It would not have put an end to the suit which the bankrupt had instituted, nor can it, therefore, put an end to the arbitration founded upon that suit; and if he has commenced an action without having any cause for it, the bankruptcy neither does nor ought to protect him against the consequences of it. Here the arbitrator was of that opinion, and his judgment is right. In the case of the *feme sole* her marriage is a revocation; for it is in law a civil death of all her rights; but bankruptcy does not produce that effect." The bankruptcy does not revoke the submission. An order of the Court has been made referring all matters, and by the Law Amendment Act, 1883 (3 & 4 Will. 4, c. 42) it is provided in section 39, "And whereas it is expedient to render references to arbitration more effectual; be it further enacted, that the power and authority of any arbitrator or umpire appointed by or in pursuance of any rule of Court, or judge's order, or order of *nisi prius*, in any action now brought or which shall be hereafter brought, or by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of any of his Majesty's Courts of Record, shall not be revocable by any party to such reference without the leave of the Court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a judge; and the arbitrator or umpire shall and may and is hereby required to proceed with the reference notwithstanding any such revocation, and to make such award, although the person making such revocation shall not afterwards attend the reference." No leave was obtained here, but on receipt of a letter from the arbitrator announcing a further sitting, the trustee in the bankruptcy wrote back, "I give you notice that I as trustee deny any agreement of reference or that any award therein is or will be binding on me, and so far as I have the power I revoke your authority." The trustee had no power to revoke the authority, and he knew he had not, for he said "so far as I have the power."

Section 37, sub-section (3) of the Bankruptcy Act, 1883, provides that "Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his

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discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy." And by sub-section (8) "'Liability' shall for the purposes of this Act include any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement or undertaking, whether the breach does or does not occur, or is or is not likely to occur or capable of occurring before the discharge of the debtor, and generally it shall include any express or implied engagement, agreement or undertaking, to pay, or capable of resulting in the payment of money, or money's worth, whether the payment is, as respects amount, fixed or unliquidated ; as respects time, present or future, certain or dependent on any one contingency or on two or more contingencies ; as to mode of valuation capable of being ascertained by fixed rules, or as matter of opinion." The order of reference was an agreement before the receiving order to pay the sum found to be due and the costs, and comes expressly within the words of the section.

*Pickford* : for the trustee in the bankruptcy.

The trustee had a right to disclaim the reference as an onerous contract.

[CAVE, J. : This was an order of the Court, and the trustee must treat it as such. He could not disclaim it. The law has gone a long way, but it has not yet gone to that length.]

There could be no proof as to costs, unless there has been a verdict or an equivalent to a verdict before bankruptcy. There are several cases to that effect.

[CAVE, J. : If your cases are before the Bankruptcy Act, 1869, they are of no use.]

Then in the case of *Marsh v. Wood* (9 B. & C. 659), "Covenant by the assignees of A. a bankrupt, on articles of agreement entered into by A. before his bankruptcy, and the defendants, whereby after reciting that differences existed between the plaintiff and the



defendants respecting certain ships of war purchased by the former, they bound themselves to abide by the award of W. S. Breach, that defendants had revoked their submission. Plea, that before any award was made A. became bankrupt, and all his interest in the subject matter of the reference was assigned to the provisional assignee. Replication, that the provisional assignee assigned to the plaintiffs. Demurrer and joinder : Held, that as the subject matter of the reference was taken out of the bankrupt and assigned to the plaintiffs, who would not have been bound by the award, the submission was no longer mutual, and therefore, was not binding, and the defendants by giving notice to the arbitrator not to proceed, did not make themselves liable to an action." And in his judgment Lord TENTERDEN said \* \* \* "After the submission to arbitration, and after some proceedings had been taken before the arbitrator, the expense of which the plaintiffs seek to recover in this action, *Rowe* became bankrupt, and all his claim, interest or demand, in or concerning the matters in dispute, was assigned first to the provisional assignee and then to the plaintiffs. Then the defendants revoked their submission. It does not appear necessary to decide that bankruptcy in general revokes a submission to arbitration ; for, in this case, it appears on the record that all the bankrupt's interest in the matters in dispute had passed to the assignees, and they clearly would not have been bound by the award of the arbitrator. The defendants therefore ought not to be bound. It is clear upon the authorities quoted at the bar, that if the original submission does not bind all the parties, it does not bind any."

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**POLLOCK, B. :**

In this case an order was made disallowing the proof of certain Judgment. costs. The question is whether that order ought to stand. On July 15th, 1884, an order was made by consent by which the matters in dispute in an action were referred to arbitration, and all the costs were to be in the discretion of the said arbitrator. Pending the arbitration the debtor became bankrupt, and after the bankruptcy an award was made. In January, 1885, a letter was written by the trustee in the bankruptcy to the arbitrator in which

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he says, "so far as I have the power I revoke your authority." But he had no right by law to revoke the authority. The bankruptcy is no revocation of the submission to arbitration, as is shown by several cases. There was also no effort in this case to obtain the leave of the Court. Mere bankruptcy is no revocation; a mere attempt to revoke is no revocation. The award was made and costs were ordered to be paid. Section 37, sub-section (3) of the Bankruptcy Act, 1883, provides that debts and liabilities to which a debtor may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy. This is an obligation incurred before the date of the receiving order, and in my opinion the decision of the County Court judge was wrong and must be reversed.

CAVE, J. :

I am of the same opinion. When the facts are looked at, this case is fairly simple. *Edwards* had brought an action against the bankrupt, and that ended in an order by consent to refer. The reference was held, and ten or eleven meetings had taken place before the bankruptcy. Now when the bankruptcy did take place, what is the state of things. Bankruptcy does not revoke the submission to arbitration. But the trustee in the bankruptcy was not bound by the reference. Consequently, the trustee seems to have thought that he had got *Edwards* into a difficulty. He seems to have thought that *Edwards* could not go on: that there could not be an award, and that, therefore, he could not get costs. The trustee forgot that, although he was not bound by the reference, yet the submission was not put an end to by the bankruptcy, and consequently *Edwards* had a right to go on with the reference and make what he could out of it. The County Court judge appears to have been of opinion that the notice given by the trustee made the reference abortive. In that he was wrong. The notice of the trustee operated nothing whatever. The reference to arbitration did not bind him, and he could not by his notice revoke the submission. The trustee had two courses open to him. He might have gone to a judge and expressed his willingness to pay what was right if the litigation was put a stop to. He might have desired to save the

estate unnecessary expense, and have obtained an order of the Court staying the reference. If he had done so, one of the terms imposed would have been to allow *Edwards* to prove as for damages for the reference coming to an end. Another course was to take no notice; to leave *Edwards* to go on if he wished, and if he did go on, to leave him to prove. That being so, it seems to me that *Edwards* is entitled to prove for the amount of these costs. There was the order by consent before bankruptcy, resulting in a liability to pay these costs which have been ascertained before the debtor has got his discharge. So under section 37 of the Bankruptcy Act, 1883, it is a liability provable in this bankruptcy, and the appeal must be allowed.

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*Appeal allowed with costs.*

Solicitors: *Chester & Co.*, for Mr. Edwards.

*J. Sephton*, for the trustee.

Cases relied upon or referred to:—

*Andrews v. Palmer*, 4 B. & Ald. 250.

*Marsh v. Wood*, 9 B. & C. 659.

## PRACTICE.

IN RE MALDEN, GIBSON & Co., EX PARTE JAMES.

*Bankruptcy Appeals (County Courts) Act, 1884, section (2).*

*Duties of Trustee in Bankruptcy with regard to Appeals—Costs against Trustee personally.*

DIVISIONAL  
 COURT.  
 BEFORE  
 POLLOCK, B.,  
 and  
 CAVE, J.,  
 1886.

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 and 24th.

Where, in a case of any legal difficulty, a trustee in a bankruptcy has obtained the decision of the Court, if such trustee appeals from the decision given and does not succeed, the order for costs will be made against him personally.

A trustee, therefore, before appealing from such decision ought to obtain the consent of the creditors to do so, and also to obtain a guarantee from such creditors for his own protection in the event of the appeal being decided against him.

IN RE  
MALDEN,  
GIBSON  
& CO.,  
EX PARTE  
JAMES.

THIS was an appeal on behalf of the trustee in the bankruptcy against an order of the learned judge of the Liverpool County Court reversing the decision of the said trustee rejecting a proof and allowing the said proof to stand.

This Court affirmed the order of the County Court, and in the course of his judgment, Mr. Justice CAVE laid down the following rules for the guidance of trustees in the case of appeals :—

*Taylor, Q.C.*, for the appellant.

*E. Cooper Willis, Q.C. (Yates with him)*, for the respondent.

CAVE, J. :

Judgment.

\* \* \* \* \* I am of opinion, therefore, that the decision of the County Court judge was right. I will say a word also as to the duties of trustees with regard to appeals. When a trustee finds himself in any legal difficulty, it is his right to go to the Court and to have his position fortified by a decision of the Court. But when that has been done and he has obtained the opinion of the Court, he ought to abide by it, and if he appeals he enters upon very dangerous ground indeed. If the trustee should be advised that there is a good ground of appeal, he ought before appealing to get the consent of the creditors, and he ought also to get a guarantee from some of them. If such a guarantee is refused the trustee would be justified in refusing to go on with an appeal, and in that case, if a creditor thinks that an appeal ought to be prosecuted, such creditor would be at liberty to apply to the Court for leave to use the name of the trustee on giving him an indemnity, as was laid down in a recent case (see *In re Genese, Ex parte Kearsley & Co.*, ante, p. 57). If a trustee proceeds with an appeal and fails, I am clearly of opinion he ought to pay the costs personally. Where he has obtained a guarantee he has made himself safe, but the order should be against him personally, and not that the costs should be paid out of the estate.

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IN RE PEARSON, EX PARTE WEST CANNOCK COLLIERY DIVISIONAL  
COMPANY. COURT.

BEFORE  
POLLOCK, B.  
and  
CAVE, J.  
1886.  
June 23rd.

*Bankruptcy Act, 1883, sections 45 and 46.*

*Execution on Goods—Debt Paid to Sheriff—Subsequent Bankruptcy of Debtor—  
Right of Creditor to Money paid.*

On February 3rd, 1886, the sheriff having seized the goods of a debtor under an execution for more than twenty pounds, the debtor on February 4th, before sale, paid him the amount of the debt and costs.

Notice was given of this payment to the judgment creditors, who on February 11th assented to the payment and wrote to the sheriff for the money.

On February 13th a bankruptcy petition was presented against the debtor, who was adjudicated bankrupt thereon, and the trustee in the bankruptcy having laid claim to the money so paid, an order was obtained in the County Court directing the sheriff to hand over the amount to such trustee.

*Held* (on appeal) : That the payment out by a debtor of an execution upon his goods is not a "sale" within the meaning of section 46, sub-section (2), of the Bankruptcy Act, 1883 : that the money was received by the sheriff for the judgment creditors, who were entitled to it as against the trustee in the bankruptcy : and that the order of the County Court directing the sheriff to pay over the money to such trustee was wrong.

THIS was an appeal on behalf of the West Cannock Colliery Company against an order of the learned judge of the Dudley County Court directing the sheriff of Worcestershire to pay over to the trustee in the bankruptcy of *Pearson* the sum of 23*l.*, received by him from the said bankrupt under a *fi. fa.*

The case raised an important question under sections 45 and 46 of the Bankruptcy Act, 1883.

Section 45 provides :—“(1) Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor. (2) For the purposes of this Act, an execution against goods is completed by seizure and sale ; an attachment of a debt

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is completed by receipt of the debt ; and an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver."

And section 46 provides : "(1) Where the goods of a debtor are taken in execution, and before the sale thereof notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods to the official receiver or trustee under the order, but the costs of the execution shall be a charge on the goods so delivered, and the official receiver or trustee may sell the goods or an adequate part thereof for the purpose of satisfying the charge. (2) Where the goods of a debtor are sold under an execution in respect of a judgment for a sum exceeding twenty pounds, the sheriff shall deduct the costs of the execution from the proceeds of sale, and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and the debtor is adjudged bankrupt thereon, or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the trustee in the bankruptcy, who shall be entitled to retain the same as against the execution creditor, but otherwise he shall deal with it as if no notice of the presentation of a bankruptcy petition had been served on him. (3) An execution levied by seizure and sale on the goods of a debtor is not invalid by reason only of its being an act of bankruptcy, and a person who purchases the goods in good faith under a sale by the sheriff shall in all cases acquire a good title to them against the trustee in bankruptcy."

On January 12th, 1886, a writ was issued by the Colliery Company against *Pearson* in respect of a debt due to them, and on January 19th, the sum of 10*l.* was paid by the debtor on account.

On February 1st, 1886, judgment was recovered for 23*l.* the balance due, and on February 3rd, a *fi. fa.* was levied on the debtor's goods.

On February 4th, the debtor paid the 23*l.* and the costs of the levy, &c., to the sheriff's officer.

On February 9th the Colliery Company were informed of this payment, and on the 11th they wrote to the sheriff for the money.

On February 13th a bankruptcy petition was presented against *Pearson*, upon which he was adjudicated bankrupt in March last.

Notice was thereupon served upon the sheriff to retain the money, to which the trustee in the bankruptcy laid claim, and the County Court judge subsequently made an order in favour of the said trustee.

From this order the Colliery Company now appealed.

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*Herbert Reed* for the West Cannock Colliery Company :

The case raises the question whether sections 45 and 46 of the Bankruptcy Act, 1883, affect the rights of the plaintiffs to receive these moneys. Those sections are in derogation of the ordinary rights of parties, and do not hit cases which are not within the words of the section. Section 46, sub-section (2) of the Bankruptcy Act, 1883, is almost identical with section 87 of the Act of 1869. Under that it was held that unless the process was in accordance with the terms of the section the creditor was entitled to the money (*Ex parte Reya, In re Salinger*, L. R. 6 Ch. Div. 332, 40 L. J. Bank. 122, 37 L. T. 17. *In re Hinks, Ex parte Berthier*, L. R. 7 Ch. Div. 882 ; 47 L. J. Bank. 74). The creditor by doing anything which took the case out of the section might make himself entitled to the money. Section 46, sub-section (2), does not say that the sheriff is to hold the proceeds of the levy or of the execution, but it does say that "the sheriff shall deduct the costs of the execution from the proceeds of sale, and retain the balance," that is the proceeds of sale. The section only speaks of the proceeds of the sale. When the debtor pays money to the sheriff, the sheriff holds the money for the creditor's use. In the case of *Stock v. Holland* (L. R. 9 Ex. 147 ; 43 L. J. Ex. 112 ; 31 L. T. 121), "the sheriff having seized the goods of a trader debtor under an execution for more than fifty pounds, the debtor, before sale, paid him, on November 18th and November 21st, two sums of £100 and £32 respectively on account of the debt. The judgment creditors knew of and assented to the payments. The debtor on November 24th filed a petition for liquidation and a restraining order was served on the sheriff, who continued to hold the sums so paid on account.

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Subsequently on December 20th trustees were appointed, who claimed the £132. It was held that the judgment creditors having assented to the payments, were entitled to the money as against the trustees." That appears to be a precise authority on this case unless the law is altered by sections 45 & 46 (Counsel also referred to the case of *Boyle v. Blackstock*, 8 L. T. 641).

[POLLOCK, B.: The County Court judge appears to have treated the transaction as a sale. It is certainly a novel view to me that when a person pays out a sheriff it is a sale. A man does not buy his own goods in such a case.]

*Muir Mackenzie* for the official receiver as trustee :

The short point is whether at the time of the receiving order this money in the hands of the sheriff was the creditor's money. The County Court judge held that what took place amounted to a sale. If I may presume to say so, I do not agree with that view, and I do not propose to argue the case on that ground. But I do argue that, although there was not a sale or act of bankruptcy, the money being in the hands of the sheriff at the date of the receiving order the trustee is entitled to it. This money was paid to the sheriff, and being paid to the sheriff and in his hands at the date of the receiving order it belongs to the trustee.

[POLLOCK, B.: I notice that in the case of *Stock v. Holland* (L. R. 9 Ex. 147), Baron CLEASBY, after dealing with the case of *Ex parte Brooke* (L. R. 9 Ch. 301), which he is of opinion concludes that case, says: "It is said the case is distinguishable from the present one on two grounds. First, there was a seizure here. But I do not think this makes any difference. The money was paid here, as it was there, to prevent the execution from being completed, and, as soon as it was assented to, became the money of the creditors." Baron CLEASBY was not a judge who stated his opinion rashly, and he says that.]

I submit that it is a payment to the sheriff as an officer of the law. The case really comes within section 45. The execution is not completed until the money has been paid over to the creditor.



POLLOCK, B.:

I regret that I cannot agree with the view taken by the County Court judge in this case. Mr. *Mackenzie*, in my opinion, wisely did not seek to support the grounds of his decision. The only question really is, what is the effect to be given to this transaction with reference to section 46, sub-section (2) of the Bankruptcy Act, 1883. These goods were seized in the ordinary course, and as soon as the seizure was made, the money was paid by the judgment debtor. Now the County Court judge has said that the sheriff being in potential possession of the goods, that transaction operated as a sale. I must say, in my opinion, that is quite contrary to the usual view taken of a transaction of this kind. If goods are seized in this manner, and, as often happens, the debt and costs are paid by a relation of the debtor, it does not follow that a sale takes place. But Mr. *Mackenzie* further said that what took place did not vest the payment in the execution creditor, and therefore the payment made was not made for the benefit of the execution creditor. Now I see no indication in section 46, sub-section (2), that in this respect it was intended to alter the law. The old law is laid down in *Ex parte Brooke* (L. R. 9 Ch. 301), and in *Scott v. Holland* (L. R. 9 Ex. 147; 43 L. J. Ex. 112; 31 L. T. 121); and I entirely adopt the opinion expressed by Baron *CLEASBY*, when in the latter case, he said "The money was paid \* \* \* to prevent the execution from being completed, and as soon as it was assented to, became the money of the creditors." I think that occurred in this case. No mischief arises from the decision we give; we do not disturb the principles of the bankruptcy law. The order of the County Court must be set aside.

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Judgment.

CAVE, J.:

I am of the same opinion. It is impossible to say there was a sale. Look at the consequences which would ensue if payment out of an execution could be treated as a sale. The result would be that a man who had the misfortune to suffer an execution—if the next moment he paid the money—would be held to have committed an act of bankruptcy because there has been a sale. But Mr. *Mackenzie* further said that the money at the time of the petition

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was not the creditor's, and that the trustee was entitled to it. It was argued that that is so because payment to the sheriff does not give the creditor a complete right to the money. But it must also be made out that the money is the bankrupt's. If it is not the bankrupt's the trustee has no title to it. Now can it be said to be the bankrupt's? The goods of the debtor are taken in hostage: the judgment debt is paid, and the sheriff is bound to go out and give up the hostage. For whom does the sheriff receive the money? For the creditor, and there is no authority for saying that he receives it for any other person. Section 45 of the Act refers to an entirely different matter. It is not this case. The creditor is not seeking to retain the benefit of the execution. The execution is at an end long ago. When the debtor has paid out the execution the creditor does not want the execution at all. The money cannot be the bankrupt's. He has handed it over to the sheriff with the intent to relieve himself of the judgment liability. He has discharged himself of the liability. He has paid his debt by having transferred the right to the money which he has paid over to the sheriff to some other person, that is to the execution creditor. I am of opinion, therefore, that this appeal must be allowed with costs.

*Appeal allowed with costs.*

Solicitors: *Stevens, Bawtree, & Stevens*, for the West Cannock Colliery Company.

*The Solicitor to the Board of Trade*, for the trustee in bankruptcy.

Cases relied upon or referred to:—

*Ex parte Reya, In re Salinger*, L. R. 6 Ch. Div. 332; 40 L. J. Bank. 122; 37 L. T. 17.

*In re Hinks, ex parte Berthier*, L. R. 7 Ch. Div. 882; 47 L. J. Bank. 74.

*Stock v. Holland*, L. R. 9 Ex. 147; 43 L. J. Ex. 112; 31 L. T. 121.

*Boyle v. Blackstock*, 8 L. T. 641.

*Ex parte Brooke*, L. R. 9 Ch. 301.

## IN RE ARMSTRONG, EX PARTE ARMSTRONG.

*Bankruptcy Act, 1883, sections 24, 44, 152, 168.**Married Woman—Separate Trading—Liability to Bankruptcy Laws—General Power of Appointment—"Separate Property"—Married Women's Property Act, 1882, section 1, sub-section (5).*COURT OF  
APPEAL.BEFORE THE  
MASTER OF  
THE ROLLS,  
BOWEN, L.J.,  
FRY, L.J.,  
1886.JUN: 25<sup>th</sup>  
and 26<sup>th</sup>.*Held:* (1) That the capacity to exercise a general power of appointing property is not property.(2) That the "separate property" referred to in section 1, subsection (5) of the Married Women's Property Act, 1882, which provides that "Every married woman carrying on a trade separately from her husband, shall in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*," comprises only that which would be her property if she were a *feme sole*.

Thus, where by a settlement, real property was vested in a trustee in trust for a married woman—who traded separately from her husband and became bankrupt,—for life for her separate use, without restraint on anticipation, with remainder to such persons as she might, whether covert or sole, appoint, and with further trusts in default of appointment, the Court would not compel her to exercise in favour of the trustee in the bankruptcy such power of appointment.

(3) (*Per Lord ESHER*): That the jurisdiction of refusing or permitting an appeal is a very delicate jurisdiction, but where a question is one of principle and has been decided for the first time, it is not a sufficient reason for refusing leave to appeal because a judge is himself of opinion that he has given a right decision.

**T**HIS was an appeal from an order of the Divisional Court sitting in Bankruptcy reversing an order made by the learned Judge of the Brentford County Court, and directing that *Emma Armstrong*, the bankrupt, should exercise a certain power of appointment reserved to her by her marriage settlement, in favour of the trustee in her said bankruptcy.

The case raised an important question as to the extent to which a married woman who carries on a trade separately from her husband is now subject to the bankruptcy law.

The bankrupt, *Emma Armstrong*, is a married woman, who at the time of her bankruptcy carried on business separately from her husband as a lighterman and barge-owner.

On May 6th, 1884, she was adjudicated a bankrupt on her own petition.

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In December, 1881, the bankrupt had married for the second time, being then a widow with one child, a son by her first marriage.

By a settlement made in November, 1881, in contemplation of the marriage, she conveyed two freehold houses belonging to her to a trustee in fee, upon trust (after the solemnization of the marriage) to pay the rents or permit the same to be received by the wife during her life for her separate use, but without any restriction on anticipation, and, after her death, upon trust for such person or persons, and in such manner as she, whether *covert* or *sole*, should by deed or will appoint, and in default of appointment, upon trust for the son of the former marriage, and the children of the then intended marriage, in equal shares as tenants in common in fee, with remainder to the right heirs of the wife.

There was also a power for the trustee or trustees of the settlement during the life of the wife, with her consent in writing, from time to time to raise by way of sale or mortgage of the property such sum or sums of money as she might direct, and to pay the same to her, and that her receipt alone should be a sufficient discharge.

There was no child of the second marriage.

On the bankruptcy of the said *Emma Armstrong*, the trustee therein applied to the learned Judge of the County Court at Brentford for an order directing the bankrupt to execute a deed in exercise of the power of appointment, appointing the two houses to the said trustee in order that they might be made available for the creditors in the bankruptcy.

This application was refused by the County Court Judge, but on an appeal by the trustee to the Divisional Court in bankruptcy an order was made directing the bankrupt to execute the deed in question, the Court forming its decision chiefly on the ground that section 19 of the Married Women's Property Act, 1882, did not exclude the operation of the Act by reason of the execution of the settlement.

From that decision of the Divisional Court the bankrupt *Emma Armstrong* appealed, and the Court of Appeal now reversed the order on the ground that the capacity to exercise a general power of appointment was not property at all, and therefore could not be

separate property within the meaning of section 1, sub-section (5) of the Married Women's Property Act, 1882, which provides that "Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*."

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Section 24 of the Bankruptcy Act, 1883, provides amongst other duties of a debtor as to the discovery and realization of his property that such debtor shall " \* \* \* execute such powers of attorney, conveyances, deeds, and instruments, and generally do all such acts and things in relation to his property, and the distribution of the proceeds amongst his creditors, as may be reasonably required by the official receiver, special manager, or trustee, or may be prescribed by general rules, or be directed by the Court by any special order or orders made in reference to any particular case, or made on the occasion of any special application by the official receiver, special manager, trustee, or any creditor or person interested."

By section 44, sub-section (ii), the property of a bankrupt divisible amongst his creditors shall comprise "The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge, except the right of nomination to a vacant ecclesiastical benefice."

Section 168 defines "Property" as including "Money, goods, things in action, land, and every description of property, whether real or personal, and whether situate in England or elsewhere; also, obligations, easements, and every description of estate; interest and profit, present or future, vested or contingent, arising out of or incident to property as above defined."

And section 152 provides that "Nothing in this Act shall affect the provisions of the Married Women's Property Act, 1882."

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*Ribton* : for the bankrupt Emma Armstrong.

In order to get this property within the Bankruptcy Act it is necessary to see whether it satisfies the conditions of the Married Women's Property Act. This general power of appointment never was separate property. Except so far as her life interest may be concerned, this property was not the separate property of the bankrupt, and therefore was not within section 1, sub-section (5). She had a power of disposal, but that is not included in the ordinary meaning of the term "property." (Counsel referred to *Johnson v. Gallagher*, 3 De G. F. & J. 516 : *Hughes v. Wells*, 9 Hare, 749.)

*Cozens-Hardy, Q.C.* (*Herbert Reed* with him) : for the trustee in the bankruptcy.

The property is separate property. When a married woman has a life estate for her separate use coupled with a full power to deal with the property by deed or will as she thinks fit such property is separate property. (Counsel referred to *Hulne v. Tenant*, 1 W. & T. Leading Cases, 5th ed., p. 586, and notes : *Heatley v. Thomas*, 15 Ves. 596 : *London Chartered Bank of Australia v. Lempriere*, L. R. 4 P. C. 572.) Separate property is whatever a married woman may dispose of without her husband's consent at her free will and pleasure. The Act itself shows that separate property in the Act must be that property which a Court of Equity would render available for the debts of a married woman. (Counsel referred to *In re Harvey's Estate* : *Godfrey v. Harben*, L. R. 13 Ch. Div. 216 ; 49 L. J. Ch. 3 : *Pike v. Fitzgibbon*, L. R. 17 Ch. Div. 454 ; 50 L. J. Ch. 394 ; 44 L. T. 562.) A general power of appointment either by deed or will coupled with a life estate is separate property. (Counsel also referred to *Mayd v. Field*, L. R. 3 Ch. Div. 587 ; 45 L. J. Ch. 699 ; 34 L. T. 614 : *Ex parte Huggins*, *In re Huggins*, L. R. 21 Ch. Div. 85 ; 51 L. J. Ch. 985.)

THE MASTER OF THE ROLLS (LORD ESHER) :

Judgment.

It seems to me that this case must be considered upon a view which was never clearly, if it all, called to the attention of the judges of the Court below. There appears to have been a long and

laboured argument upon section 19 of the Married Women's Property Act, 1882, which drew off the attention of the Court from the point on which we now decide this case. The contrary to that which we must now hold seems to have been assumed by counsel in the Court below and not really argued at all. We can hardly be said, therefore, to be overruling the decision then given.

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In this case a lady was married before the Married Women's Property Act, 1882, and on her marriage a settlement was executed. By that settlement she had a life estate in the property settled to her separate use, and after her death it was to go to the son of the first marriage; but she had a power to appoint by deed during her life or by will. This lady became a trader and was made bankrupt. The question is whether she not having made any appointment,—whether the Court of Bankruptcy can compel her to execute an appointment so that the property may pass to the trustee in the bankruptcy, and be made available for the creditors. The question depends entirely on what is the true construction of section 1, sub-section (5), of the Married Women's Property Act, 1882. At Common Law, except by custom in certain localities, a married woman who was a trader could not be made a bankrupt. Therefore, the section of the Married Women's Property Act is a new enactment. It does not declare the Common Law, but it makes a new liability. The legislature might have put a married woman on the same footing of liability as if she were a *feme sole*, or it might have created a limited liability on her part. The question is what is the meaning of the enactment. Section 1, sub-section (5), provides that "Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*." The section does not say that a married woman who is a trader shall be subject to the bankruptcy laws as if she were a *feme sole*. But what it does say is that she shall "in respect of her separate property" be subject to those laws as if she were a *feme sole*. Now do those words comprise this unexercised power of appointment which she is now desired to exercise? Taking the words in their ordinary sense, without any knowledge of anything outside the Act, what is the meaning of the words "in respect of her separate property?" Can those words comprise that which,

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if she were a *feme sole*, would not be her property at all? Can they comprise anything more than that which, if she were a *feme sole*, would be her property, and which, although she is a married woman, will be her separate property? It must be admitted that this unexercised power is not property. If the bankrupt had been a *feme sole* the unexercised power would not have been her property at all. The difference between a power and property has been fully recognised, and an unexercised power has been held not to be property. There is here also a vested remainder in the son of the first marriage. If nothing is done the trust is for him. We have now no question before us as to the wife's life interest. The legal estate in the remainder is in the trustees, and the son is now the beneficial owner of the property in remainder, subject to the possibility of his interest being divested by an exercise of the power of appointment. This phrase "in respect of her separate property" is used over and over again in the Married Women's Property Act, 1882. In any other part of the Act it could not comprise that which, if a woman were a *feme sole*, would not be property at all, and therefore would not comprise such a power as this. Can it be said that the phrase is to have a different meaning in section 1, sub-section (5), than in other parts of the Act? In the case of a bankrupt *feme sole* the power of appointment might, perhaps, be reached by the trustee in the bankruptcy under section 44 of the Bankruptcy Act, 1883, and the result would be that something may pass to the trustee in bankruptcy of a *feme sole*, which would not pass to the trustee in bankruptcy of a married woman. After what I have said, therefore, I do not think it necessary to go into some of the arguments used in the Court below and referred to here. The point upon which we decide the case was not really brought before the Divisional Court, and it is wholly unnecessary to consider the question raised upon section 19 of the Act.

There is one other point, however, on which I will venture to speak. There was a difficulty suggested about leave to appeal not being at first given by the Divisional Court. It was said that leave to appeal from the decision of the Divisional Court was in the first instance refused by that Court. Now the jurisdiction of refusing or permitting an appeal is a very delicate jurisdiction, but I will venture to say this for the guidance of my brother judges, that the



fact that a judge is satisfied that he is deciding right is not a sufficient reason for refusing leave to appeal when the question is one of principle, and has been decided for the first time. If it were so it is only proper to conclude that in every case leave to appeal ought to be refused.

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BOWEN, L.J. :

I am of the same opinion. It seems to me that the first step is made in the decision of this case when we come to a clear conclusion that "separate property" in section 1, sub-section (5), of the Married Women's Property Act, 1882, must mean the same thing as the terms "separate property" throughout the Act generally. I should have thought that the question whether this power was separate property within the Act would have solved itself as soon as it was admitted that it was not property at all. It is clear that the power to appoint would not be "property" in the case of an unmarried woman. It could only be property in the case of a married woman, if Courts of Equity had held it to be so. It is said, indeed, that Courts of Equity have, in the case of a married woman, held that to be "property" which is not property in the case of a *feme sole*. I do not think that is the case. It is true that in cases where a married woman has had a general power of appointment, with remainder in default of appointment to her executors and administrators, Courts of Equity have given effect after the death of such married woman to her contracts out of the property subject to the power, as if it had been her property. I am not aware, however, that this has ever been done during the lifetime of a married woman. Then it was further said that section 44 of the Bankruptcy Act, 1883, has brought within the scope of the Bankruptcy Courts powers which otherwise would not be property. But in order to make that argument good, it is necessary to go the length of saying that the Married Women's Property Act, 1882, made that to be "separate property" for all its purposes which is not "property" in the widest sense of the word, but only in the sense of the Bankruptcy Act. Can it be said that the Act makes that "separate property" which is not property in the ordinary legal sense? If the legislature had wished to declare that for the purposes of a married woman's bankruptcy everything could be

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taken which would have been "property" in bankruptcy if she had not been a married woman, it could have said so plainly. The legislature has not said so. It has omitted to use the words necessary to bring into the net of the Bankruptcy Court this general power of appointment.

FRY, L.J.:

I am of the same opinion. The case turns upon the meaning of the term "separate property" in section 1, sub-section (5), of the Married Women's Property Act, 1882. Two questions arise, (1) What is the meaning of the words "separate property?" and (2) Are those words used in the Act of Parliament in any special sense? To my mind the question we have to decide is one of the most elementary principle. No two ideas can be more distinct than those of "property" and "power." A power is an individual capacity to do something. The power to appoint is no more property than the power to write a poem or to sing a song. The exercise of the power may result in property vesting in the person who exercises it, but it is not property. I should have thought the point almost unarguable if it had not been argued. That being so, have Courts of Equity ever said that these powers are property? Certainly no such imputation can be made. They have always recognised that a power and property are not the same. It would be departing from the legal meaning of the word "property" to say that it included the capacity to do an act. But it is said that if the word "property" does not include a power, the words "separate property" do include it. That, however, makes the species greater than the genus. Further, it was said that whatever the legal meaning of the words may be, and even irrespective of it, that as used in section 1, sub-section (5), of this Act of Parliament, they must be held to include a power. But if we hold that the words "separate property" in section 1, sub-section (5), include a power, we must hold those words to include a power throughout the Act. I am certainly not prepared to say that the legislature had any intention of including a power. The legislature might intend to omit it, and have considered a case like this case, in which, if a power was treated as property, it would defeat the interest of the children of the married woman. We have nothing

to do but to construe the words in their ordinary meaning. There is nothing in the context to show that anything but the ordinary meaning was intended. When the Bankruptcy Act, 1883, was passed, the legislature re-enacted section 15 of the Act of 1869, but provided that nothing in the Act should affect the provisions of the Married Women's Property Act, 1882. I am of opinion, therefore, that a power is not property: that a power is not separate property: and that this appeal must be allowed with costs.

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*Appeal allowed with costs.*

Solicitors: *Woodbridge & Sons*, for the bankrupt, Emma Armstrong.

*J. A. & H. E. Farnfield*, for the trustee in the bankruptcy.

Cases relied upon or referred to:—

*Johnson v. Gallagher*, 3 De G. F. & J. 516.

*Hughes v. Wells*, 9 Hare, 749.

*Hulme v. Tenant*, 1 W. & T. Leading Cases, 5th ed., p. 586, and notes.

*Heatley v. Thomas*, 15 Ves. 596.

*London Chartered Bank of Australia v. Lempriere*, L. R. 4 P. C. 572.

*In re Harvey's Estate, Godfrey v. Harben*, L. R. 13 Ch. Div. 216; 49 L. J. Ch. 3.

*Pike v. Fitzgibbon*, L. R. 17 Ch. Div. 454; 50 L. J. Ch. 394; 44 L. T. 562.

*Mayd v. Field*, L. R. 3 Ch. Div. 587; 45 L. J. Ch. 699; 34 L. T. 614.

*Ex parte Huggins, In re Huggins*, L. R. 21 Ch. Div. 85; 51 L. J. Ch. 985.

## PRACTICE.

COURT OF  
APPEAL.BEFORE THE  
MASTER OF  
THE ROLLS,  
BOWEN, L.J.,  
FRY, L.J.  
1886.June 25<sup>th</sup>.

IN RE SMITH, EX PARTE BROWN.

*Bankruptcy Act, 1883, section 89, sub-section (1).**Costs—Personal Order on Trustee to Pay—Improper Rejection of Proof—Directions of Committee of Inspection—Debtors Act, 1869, section 27.*

*Held:* (1) That although by section 89, sub-section (1) of the Bankruptcy Act, 1883, a trustee shall, in the administration of the property of the bankrupt and in the distribution thereof amongst his creditors, have regard to any directions which may be given by the committee of inspection; nevertheless, if such trustee unreasonably and vexatiously rejects a proof of debt, the Court will order him to pay personally the costs occasioned by such rejection, even though in so doing he acted under the directions of the committee.

Where the view taken by a committee of inspection upon any question is frivolous and wasteful of the assets, the trustee is not justified in acting upon it, and cannot set up the directions of such committee as a defence against a personal order upon him to pay costs.

(2) That a trustee ought not to reject a proof tendered in respect of a debt, for which a judgment by consent has been obtained, merely on the ground that a copy not having been filed as required by section 27 of the Debtors Act, 1869 the judgment or any execution issued or taken out thereon is void; but in such case the trustee ought to investigate the validity of the alleged debt.

THIS was an appeal from a decision of Mr. Justice CAVE, overruling the rejection by the trustee of a proof of debt tendered in the bankruptcy of *Smith* by the executors of the father of the said bankrupt.

The case raised an important question as to the liability of a trustee in bankruptcy to pay costs personally on an improper rejection of a proof.

On the bankruptcy of the debtor *Smith*, a proof was tendered by Messrs. *Clutton* and *Skrine*, the executors of the bankrupt's father, for the sum of 41,863*l.*, being in part comprised of money lent to the bankrupt by his father, and also of money paid by the said executors under a guarantee given by the father in respect of a debt due from the bankrupt.

A schedule containing a statements of accounts was affixed to the

affidavit made by the executors in support of the proof, in which one of the items in the said account was set down as 49,178*l*. being the amount for which judgment had been signed in an action against the bankrupt by the executors for money lent by his father, which judgment had been obtained by consent before the bankruptcy.

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The trustee in the bankruptcy, acting under the directions of the committee of inspection, rejected the proof so far as regarded the amount of the judgment debt on the ground that the said judgment was signed or entered up "under a judgment order made by consent given by the bankrupt in a personal action, and that a copy of the order not having been filed as required by section 27 of the Debtors Act, 1869, the judgment or any execution issued or taken out thereon was void."

Section 27 of the Debtors Act, 1869, provides that "Where a judge's order, made by consent, is given by a defendant in a personal action whereby the plaintiff is authorised forthwith or at any future time to sign or enter up judgment, or to issue or to take out execution, whether such order is made subject to any defeasance or condition or not, then if the action is in the Court of Queen's Bench the order, and if the action is in any other court a true copy of the order, shall, together with an affidavit of the time of such consent being given, and a description of the residence and occupation of the defendant, be filed with the officer acting as clerk of the dockets and judgments in the Court of Queen's Bench within twenty-one days after the making of the order otherwise the order and any judgment signed or entered up thereon, and any execution issued or taken out on such judgment, shall be void."

On an appeal by the executors from this rejection to Mr. Justice CAVE, that learned judge overruled the decision of the trustee and directed that the proof should go back to him to exercise his judgment thereon as presented upon the merits.

And it was further ordered that the trustee should pay personally to the executors their costs occasioned by the rejection, and that the amount of such costs should not be allowed out of the estate.

From this decision Mr. *Brown*, the trustee, now appealed.

*E. Cooper Willis*, Q. C. (*Sidney Woolf* with him): for the trustee in the bankruptcy.

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\* \* \* \* The trustee acted perfectly honestly in the matter. Taking it at the very highest all that can be said against him is that he committed an error of judgment. Further than this he was bound to obey the directions of the committee of inspection, and the committee of inspection ordered him to reject this proof. Section 89, sub-section (1) of the Bankruptcy Act, 1883, provides that: "Subject to the provisions of this Act the trustee shall, in the administration of the property of the bankrupt and in the distribution thereof amongst his creditors, have regard to any directions that may be given by resolution of the creditors at any general meeting, or by the committee of inspection, and any directions so given by the creditors at any general meeting shall in case of conflict be deemed to override any directions given by the committee of inspection."

*Winslow, Q.C. (Wace with him):* for Messrs. Clutton & Skrine, the executors.

#### THE MASTER OF THE ROLLS (LORD ESHER):

Judgment.

In this case, on the bankruptcy of the debtor, a proof was tendered in the bankruptcy by the executors of the bankrupt's father. That proof was in all for the sum of 41,863*l.*, and was made up partly of money lent to the bankrupt by his father, and partly of money paid by the executors under a guarantee given by the father in respect of a debt due from the bankrupt. In support of their proof the executors gave in a statement of accounts, and it is in respect of one of the items in that account that the present dispute has arisen. The item in question was a sum of 49,178*l.*, which was described as an amount for which judgment had been signed in an action against the bankrupt by the executors, being for money lent to the bankrupt by the father. Certain deductions were allowed on the account which brought the whole proof to 41,863*l.*, but the proof was rejected by the trustee in the bankruptcy on the ground that the judgment in question was signed or entered up under a judgment order made by consent given by the bankrupt in a personal action, and that a copy of the order was not filed in the manner required by section 27 of the Debtors Act, 1869, and so that the judgment and any execution

issued or taken out on it was void. The first question which arises, therefore is, whether the trustee was right in so rejecting this proof. Now it is clear that the claim of the executors to prove was made in respect of the judgment, and also in respect of the consideration on which the judgment was founded. After obtaining the judgment by consent the executors neglected to comply with the requirements of section 27 of the Debtors Act, 1869. Probably by inadvertence they failed to do what was necessary under that act, but such being the case it was impossible to say that the judgment they had obtained was a binding judgment on which execution could be issued. But, on the other hand, before the judgment the consent of the bankrupt to its being entered up had been given in respect of a claim made by the executors, as a legal claim on which they intended to insist. The bankrupt admitted practically that he had no defence to the claim. The proof was rejected by the trustee in the bankruptcy on the ground that the judgment was not binding. There was no other ground assigned for the rejection, except now it is said that the exact dates of certain advances made by the father have not been furnished, with regard to which I will say that it is practically impossible that such particulars can be given after the father's death. The trustee rejected the proof on the ground that the judgment was not binding, but on an appeal by the executors to Mr. Justice CAVE, that learned judge held that the trustee ought to have investigated the original consideration, and he directed that the proof should go back to the trustee to exercise his judgment thereon as presented upon the merits. That order was, in my opinion, in every way a proper one. But Mr. Justice CAVE made a further order, by which he said that in rejecting the proof when he had no real ground for suspicion the trustee had acted frivolously, and by insisting on the objection under the circumstances, he had wasted the bankrupt's assets. The trustee, therefore, ought to pay costs personally, and not to be allowed to take them out of the estate. Now the judge had undoubtedly a discretion as to costs, and to my mind that discretion was here very wisely exercised. It is said now, however, that the trustee was bound to obey the directions of the committee of inspection, and that the committee of inspection ordered him to reject this

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proof. What does that argument come to? It comes to this, that however frivolous and nonsensical the view of a committee of inspection might be, the trustee would be justified in acting upon it, and that a judge had no power to order him to pay costs. A more monstrous conclusion I cannot conceive. It is true that section 89 of the Bankruptcy Act, 1883, provides that in the administration of the property of a bankrupt, and in the distribution thereof amongst his creditors, the trustee shall have regard to any directions which may be given by the committee of inspection, but that certainly does not justify such trustee in acting in a manner which the judge considers frivolous and vexatious, and wasteful of the assets. It is impossible to conceive that the trustee would be justified in acting in such a manner merely because the committee of inspection had directed him to do so. The trustee, as in this case, may be perfectly honest in what he has done, in the sense that he has not acted in any way with a view to his own advantage, but he has undoubtedly taken an unreasonable course. This Court can and will never interfere with the exercise of the discretion of the judge as to costs unless it is perfectly satisfied such discretion was wrong. In this case, as I have said, in my opinion the judge was perfectly right, and this appeal must, therefore, be dismissed with costs also against the trustee personally.

BOWEN, L.J.:

I am of the same opinion. In this case the claim to prove was founded on the judgment and also on the debt. The judgment was invalid by reason of section 27 of the Debtors Act, 1869, and the trustee instead of going into the real merits of the case rejected the whole claim. In that he was clearly wrong. The original rights of the creditors still remained, even though the formalities required by section 27 of the Debtors Act had not been complied with. The merits were still behind the judgment, although it was to be counted of no effect, and it was the duty of the trustee to investigate them. It is a monstrous supposition to argue that because the committee of inspection chose to direct the trustee to adopt the course which he adopted the Court could not lay its hand upon him. If that were so, it would place the Court entirely



at the mercy of the committee of inspection. I am clearly of opinion that the trustee ought to pay costs, and I will go further and will say that for my own part I should not be sorry if there was a Draconian Statute directing the Court in such cases to inflict double costs.

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FRY, L.J. :

I am of the same opinion. I will not say that in this case the trustee has acted dishonestly, but he has certainly acted unreasonably. In my opinion the Court was perfectly justified in visiting him with costs.

*Appeal dismissed with costs.*

Solicitors: *Munns & Longden*, for the trustee in the bankruptcy.

*Law, Hussey & Hulbert*, for the executors.



### COLONIAL BANK v. WHINNEY.

*Bankruptcy Act, 1883, section 44, sub-section (iii.).*

*Order and Disposition—Reputed Ownership—Shares in Railway Company—Chose in Action.*

*Held*: That shares in a railway company are "things in action" within the meaning of section 44, sub-section (iii.) of the Bankruptcy Act, 1883, so as to be excepted from the doctrine of reputed ownership.

Where a partner in a stockbroking firm purchased shares in a railway company with money of the firm, and subsequently deposited the share certificates with the firm's bankers as security or cover for advances made by them to the firm, and before notice of the deposit had been given to the railway company, the firm, and also the members of it were adjudicated bankrupts.

*Held*: That the trustee in the bankruptcy was not entitled to such shares

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as being in the reputed ownership of the bankrupts within section 44, sub-section (iii.) of the Bankruptcy Act.

*Quere* : Whether the term "choses in action" does not now include all personal chattels not in possession.

The decision in *Colonial Bank v. Whinney* (see *ante*, Volume II., page 234) reversed.

THIS case was in the House of Lords, and therefore does not for obvious reasons fall strictly within the scope of the present series of reports.

The decision in the Court of Appeal—which is now reversed—was, however, reported at length, *ante*, Volume II., at page 284.

Under the circumstances, therefore, it is deemed advisable to enter a short note of the case, especially in the face of the important decision now given as to "shares" in connection with the reputed ownership clause.

The case arose out of the failure of the firm of *P. W. Thomas & Co.*, consisting of *W. E. Blakeway* and *P. W. Thomas*, who carried on business as stock and share brokers.

Previous to the year 1880, certain shares in the Firth Bridge Railway Company were purchased by *W. E. Blakeway* with monies of the firm, such shares being registered in his sole name. Calls on the shares were made on *W. E. Blakeway* alone as such registered owner, but were paid with monies of the firm, and the dividends on the shares were from time to time paid into the bank to the account of the firm. The shares were governed by the Companies Clauses (Scotland) Act, 1845 (8 & 9 Vict. c. 17, s. 14).

On April 1st, 1880, the firm owing the sum of 180,000*l.*, to the Colonial Bank, *W. E. Blakeway* deposited with the bank as security or cover for advances made these certificates of the Firth Bridge Shares. He also gave the bank a blank transfer signed by him.

On January 29th, 1884, *W. E. Blakeway* absconded, and on January 30th, *P. W. Thomas* presented a bankruptcy petition, upon which, on the 31st, a receiving order was made.

On February 1st, 1884, a petition was presented against the firm, and on February 5th the members of it were adjudicated bankrupts.

No notice to the Firth Bridge Company of the deposit of the share certificates was given by the Colonial Bank until January 31st, 1884.

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The shares were claimed by the trustee in the bankruptcy on the ground that they belonged to the firm, and it was held by Vice-Chancellor BACON that such shares were goods in the possession, order, or disposition of the firm in their trade or business at the date of their bankruptcy, within section 44, subsection (iii.) of the Bankruptcy Act, 1883, which provides that the property of a bankrupt divisible amongst his creditors shall comprise "All goods being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof; provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business, shall not be deemed goods within the meaning of this section."

The Court of Appeal subsequently affirmed this decision (see *ante*, Volume II., page 234), and further held (Lord Justice FRY dissenting) "that such shares were not choses in action within the meaning of the Act, so as to be excepted from the doctrine of reputed ownership."

The Colonial Bank appealed to the House of Lords.

*Sir R. Webster, Q.C. (Rigby, Q.C., and Lawrence with him) :*  
for the Colonial Bank.

*Sir H. Davey, Q.C. (Marten, Q.C., and Buckley with him) :*  
the trustee in the bankruptcy.

The House of Lords now held :—

- (1.) That in the circumstances and having regard to the fact that the share certificates contained a note that in the event of sale or transmission, the certificate must be surrendered with the deed of transfer before the transfer could be registered or a new certificate issued, the bankrupts were not the reputed owners of the interest of the

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bank in the shares, and that the order appealed against was wrong on that ground.

- (2.) That the shares were "things in action" within the meaning of section 44, subsection (iii.) of the Bankruptcy Act, 1883, so as to be excepted from the doctrine of reputed ownership.

With regard to this Lord BLACKBURN said :—

Judgment.

"\* \* \* Turning now to the proviso of the section I am of opinion that Lord Justice FRY put the right construction on that. The question is whether the expression 'things in action,' as used in the section, include shares in a railway company, which are personal chattels, the property in which does not pass by mere delivery, but does pass by a deed of transfer duly stamped and delivered to the secretary and by him entered in the register; 'and until such transfer has been so delivered to the secretary as aforesaid, the vendor of the share shall continue liable to the company for any calls that may be made upon such share, and the purchaser of the share shall not be entitled to receive any share of the profits of the undertaking, or to vote in respect of such share.' (See Companies' Clauses Act, 8 & 9 Vict. c. 17, sections 14 and 16.) It was argued—and that argument seems to have prevailed in the Court below with Lord Justice COTTON and Lord Justice LINDLEY—that choses in action had the technical sense in our old law limited to the right to sue for a debt or damages. I do not think that it is proved. A distinction has always existed between personal property capable of being stolen, taken and carried away and thus to be the subject of larceny or of seizure by the sheriff under a *fi. fa.*, and other kinds of personal property. If, for example, personal property such as I have first mentioned belonged to a married woman it vested at once in the husband; but with the rest, although the husband might reduce it into possession, he did not have it until he had done so. When new kinds of property were created, such as stock in the funds, and in later times, shares in companies, questions soon arose as to whether they were within the principle of being in possession or not; but it was not until the phrase was used in the Bankruptcy Act, 1869, that it became important to enquire whether they were to be called things in action

or not. It is to be noticed, however, that Lord Thurlow, in the case of *Dundas v. Dutens* (1 Ves. jun. 196), when speaking of stock in the funds said, 'Those things such as stock, debts, &c., being *choses in action*, are not liable. They could not be taken upon a *levari facias*.' The reason was the same as that for which they could not be the subject of larceny, because they could not be seized, and Lord Thurlow thought '*choses in action*' an apt expression to use with respect to such things. Further, shares are not within the seventeenth section of the Statute of Frauds because they do not pass by delivery; and in the case of *Humble v. Mitchell* (11 A. & E. 205) Lord Denman thought *choses in action* a proper phrase to employ with respect to them. And in *Ex parte Agra Bank, In re Worcester* (L. R. 3 Ch. App. 555), in dealing with a question of assignment of shares, Lord Hatherley said: 'Where there is an assignment of a chose in action.' Whether accurately or inaccurately, therefore, in modern times, lawyers appear to have used the phrase *choses in action* as including all personal chattels that are not in possession. In what sense, then, was it used in section 15 of the Bankruptcy Act, 1869, from which section 44 of the present Act which we are now considering was taken? It is not denied that the words show the intention of the legislature to take policies of insurance out of the order and disposition clause. Why not shares in companies also? I cannot answer that question in any way satisfactory to my mind \* \* \*."

*Appeal allowed with costs.*

Solicitors: *Lawrance, Plews & Baker*, for the Colonial Bank.

*Druces, Jackson & Attlee*, for the trustee in the  
bankruptcy.

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COLONIAL  
BANK v.  
WHINNEY.

BEFORE  
MR. JUSTICE  
CAYE.  
1886.

IN RE RIDGWAY, EX PARTE MEIN.

*Bankruptcy Act, 1883, section 39.*

July 5th. *Proof of Debt—Proof against Separate Estate of Partner—Trust Moneys paid by Trustee to his own Firm.*

A testator by his will bequeathed so much of his government securities as would produce 250*l.* per annum to trustees for the benefit of his daughter, who subsequently became insane.

The trustees, after paying the expenses for the care of the lunatic, allowed a balance to accumulate, and the sum of 564*l.*, received by one of the trustees, was paid by him into a bank in which he was a partner.

The partnership firm became bankrupt, and a proof for the 564*l.* in question was lodged by the administrator of the said daughter, who was also a trustee under the will, against the separate estate of the bankrupt trustee.

*Held:* That proof against the separate estate must be admitted, but without prejudice to any right which the trustee in the bankruptcy might have to claim contribution from the bankrupt's co-trustees.

THIS was an appeal from a decision of the trustee in the bankruptcy of *Alexander and Tobias Ridgway*, bankers and army and navy agents, rejecting a proof of debt for the sum of 564*l.* lodged by one General *Mein* against the separate estate of *Alexander Ridgway*.

By his will the late Colonel *Bowes*, who died in the year 1836, bequeathed so much of his government securities as would produce 250*l.* per annum to trustees for the benefit of his daughter Miss *Anne Bowes*.

Miss *Bowes* subsequently became lunatic, and the whole income of 250*l.* was not then required for her maintenance.

The trustees under the will, therefore, who now consisted of General *Mein*, *Alexander Ridgway*, and *B. L. Inman*, after paying the expenses of the lunatic in a private asylum out of the annuity, had allowed the balance to accumulate, the greater part being invested in government securities.

At the time of the bankruptcy of Messrs. *A. and T. Ridgway*, however, the sum of 564*l.* received by *Alexander Ridgway* was in the hands of the bankrupts, having been paid by him into a bank belonging to them.

Miss *Anne Bowes* was now dead and General *Mein* was her administrator.

A proof lodged by General *Mein* against the separate estate of *Alexander Ridgway* in respect of the said 564*l.* on the ground that the bankrupt by paying such amount to the credit of his firm had been guilty of a breach of trust, was rejected by the trustee in the bankruptcy.

From that decision General *Mein* now appealed.

*Lewin* : for General *Mein*.

Beyond making the payments to the persons in whose care Miss *Bowes* was placed the trustees had no other expenses to meet, and they ought to have invested the accumulations. At the date of the bankruptcy of Messrs. *Ridgway*, 564*l.* of this money had been paid into *Ridgway's* bank. *Alexander Ridgway* was one of the trustees under the will. He knew that the bank was insolvent and he allowed this to be done. It is a breach of trust. There has been no proof against the joint estate. General *Mein* elected to prove against the separate estate. He is entitled to go against the separate estate without considering the equities which may exist between the co-trustees. The trustee in the bankruptcy rejected the proof on the ground (1) that there had been no breach of trust by *Alexander Ridgway*, and (2) that the money was not held by him. But the payment of the money into the bank was itself a breach of trust. That alone, without the knowledge of *Alexander Ridgway* that the bank was insolvent, would be sufficient, and the knowledge of *Alexander Ridgway* as to the circumstances of the bank is proved from the examination of the bankrupt on application for discharge. If one of the trustees has knowingly committed such a breach of trust as to allow money to be paid into a bank which he knows to be insolvent, he has personally committed a breach of trust so as to enable the *cestui que trust* to bring an action against him, or in case of bankruptcy to prove for the whole amount against his estate, without considering any rights which may exist between him and his co-trustee. In the case of *Ex parte Shakeshaft, In re Kempson* (3 Brown's Ch. Ca. 196), "K. and S. being trustees of money in the funds, sell it for the benefit of S., who dies insolvent, and K.

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becomes bankrupt: the person interested in the funds may prove against the estate of K. the value of the funds at the bankruptcy, though S.'s estate be first liable." And in *Ex parte Norris, In re Biddulph* (L. R. 4 Ch. App. 280), "A lady died in 1830, leaving a will by which she gave her personal estate in trust for her sister for life, with remainder to her three trustees and executors, to all appearance beneficially. She also left a codicil, by which she impressed the residue with trusts in favour of other persons after the death of the tenant for life. This codicil was not proved till 1841, but the trustees in the meantime appeared to regard the property as not belonging to themselves, though it was not shown that they knew of the existence of the codicil. In 1834 the trustees invested part of the estate on an improper security. Two of the trustees were partners in the bank out of which the money was drawn to place it on this security. In 1840 the firm became bankrupt, and after this the security turned out insufficient. The tenant for life died in 1842. It was held that the persons claiming under the codicil were entitled to prove against the separate estate of one of the bankrupt trustees for the loss occasioned by the improper investment." The *cestui que trust* may select whichever of the trustees he likes to proceed against. In this case there was clearly a breach of trust.

*Herbert Reed*: for the trustee in the bankruptcy.

It has never been suggested that the receipt of the money was the breach of trust. 180*l.* a-year was paid to the asylum and the rest was invested.

[CAVE, J.—The only trust seems to be to pay an annuity. There is no trust to accumulate. It was really invested by the trustees as a work of supererogation.]

That is so, but the trustees did what was best to be done. General *Mein* was a trustee, and, if there was a breach of trust in accumulating he was a party to it. General *Mein* is also a beneficiary, and he has taken out letters of administration to Miss *Bowes*. He is beneficially entitled to this fund. In *Lewin on Trusts*, 8th Ed., at page 909 it is laid down that "Though, as respects the remedy of the *cestui que trust*, each trustee is in-



dividually responsible for the whole amount of the loss, whether he was the principal in the breach of trust, or was merely a consenting party, yet, as between the trustees themselves, the loss may be thrown upon the party on whom, as recipient of the money or otherwise, the responsibility ought in equity to fall, or if he be dead upon his estate; \* \* \* If all the trustees be equally guilty, then (unless the transaction was vitiated by not only constructive but such actual fraud that the Court will hold itself entirely aloof), an *apportionment* or *contribution* amongst the trustees may be compelled, which under the old practice was not allowed, in the same suit, but on a bill filed for the purpose." If each and all have committed a breach of trust it does not matter if one has derived a benefit the others must contribute. Also at page 916, Mr. Lewin says, "But where the whole debt is proved against the estate of the bankrupt trustee, the trustee in bankruptcy may afterwards take proceedings, and compel contribution from the other trustee, even where the bankrupt trustee himself could not, from his fraudulent conduct, have obtained such relief" (*Lingard v. Bromley*, 1 V. & B. 114). Then there is no right of separate proof here. These moneys were always in the hands of *Ridgway & Son*. There was no breach in the receipt of the moneys. It was the ordinary course of conducting the trust business for many years.

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CAVE, J. :

I am of opinion that this proof must be admitted. I say nothing Judgment, as to any right of the trustee to claim contribution from the co-trustees of the bankrupt.

*Application allowed with costs.*

Solicitors : *Lewin & Co.*, for General Mein.

*Parker, Garrett & Parker*, for the trustee in the  
bankruptcy.

Cases relied upon or referred to :

*Ex parte Shakeshaft*, *In re Kempson*, 8 Brown's Ch. Ca. 196.

*Ex parte Norris*, *In re Biddulph*, L. R. 4 Ch. App. 280.

*Lingard v. Bromley*, 1 V. & B. 114.

**PRACTICE.**

BEFORE  
MR. JUSTICE  
CAVE.  
1886.  
July 6th

IN RE LOWNDES, EX PARTE THE TRUSTEE.

*Bankruptcy Act, 1883, section 47.*

*Avoidance of Settlement—Infant Respondents to motion—Procedure to bring Infants before Court.*

Where it is desired to bring an infant before the Court the proper course is to apply for the appointment of a guardian *ad litem* for that purpose.

Where, on an appeal from a County Court, the Divisional Court in Bankruptcy directs such appeal to stand over in order that certain persons, some of whom are infants, may be made parties, it would appear that application for the appointment of a guardian *ad litem* should be made to the County Court.

**T**HIS was a motion pursuant to leave for an order directing that the present case be re-instated in the Divisional Court list.

The case originally came on for hearing on June 24th last in the Divisional Court in Bankruptcy before Mr. Baron POLLOCK and Mr. Justice CAVE, and was an appeal from a decision of the learned judge of the Northampton County Court, by which he refused to set aside a certain post-nuptial settlement made by the bankrupt, and ordered the trustee in the bankruptcy to pay the costs.

The case, after being opened in the Divisional Court, was ordered to stand over in order that the wife and children of the bankrupt, who were interested under the settlement, might be made parties.

A question was now raised as to the proper manner of bringing the said children before the Court.

*Muir Mackenzie*: for the trustee in the bankruptcy.

Your Lordship gave me permission on Saturday to mention this case to you to-day. The application in the County Court was on behalf of the trustee in the bankruptcy against the trustees of the settlement to set the settlement aside. That application was refused by the County Court judge, and there was an appeal to the Divisional Court. After the appeal had been opened a direction was given to serve the wife and children of the bankrupt. That has been done, and it appears that the wife had been served with

notice of motion in the County Court, and had consented to the proceedings. There seems to be no obstacle, therefore, against the case being re-instated in the list except the one question as to the manner in which the children ought to be served. The question is what procedure there is for the children to appear as respondents.

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[CAVE, J.—What I said was that you must bring the children properly before me.]

We have brought them before the Court as far as we can. There does not appear to be any special machinery for bringing an infant before the Court as respondent to a motion. The interest of Mrs. Lowndes and her children are identical.

[CAVE, J.—I shall not express any opinion now as to either of those statements. Perhaps you had better go before the registrar.]

In that case we cannot go before the registrar of this Court, we must go to the County Court.

[CAVE, J.—Probably it may be so. I will tell you this; the learned registrar here (Mr. Registrar BROUGHAM) informs me that there is really no difficulty in the matter. It is a constant practice to appoint a guardian *ad litem*.]

We must, I presume, go to the County Court.

[CAVE, J.—I think that very likely.]

Solicitor : *The Solicitor to the Board of Trade*, for the trustee in the bankruptcy.

BEFORE  
MR. JUSTICE  
CAVE.  
1886.  
July 6th.

## IN RE HINKS, EX PARTE VERDI.

*Bankruptcy Act, 1883, section 37.*

*Proof of Debt—Contingent Liability—Assignment of Lease—Liability of Assignor for Rent.*

The assignee of a lease of certain premises having become bankrupt and rent being in arrear judgment for the same was recovered against his assignor who was under covenant to pay such rent.

The assignor thereupon proved against the estate of the bankrupt for the amount so paid; and also sought to prove in respect of his contingent liability for the rent during the time the said lease had yet to run.

The last-mentioned proof was rejected by the trustee in the bankruptcy.

*Held*: That the proof must be admitted: and that an estimate must be made by the trustee in the bankruptcy of the value of the liability under section 37, subsection (4), of the Bankruptcy Act, 1883.

THIS was an appeal from the rejection by the trustee in the bankruptcy of *Hinks* of a proof of debt tendered by one *Verdi*, and raised the question whether the liability upon which the claim was founded was capable of valuation for the purposes of proof.

In the year 1873 a Mrs. *Newman* granted to one *Sturrock* a lease of certain premises in Vigo Street for twenty-one years at a yearly rental of 240*l.*

In 1876 *Sturrock* assigned the premises to one *Benjamin*. In 1877 *Benjamin* assigned to *Verdi*, the present applicant, for the residue of the term; and in 1879 *Verdi* further assigned to the bankrupt *Hinks*.

All the assignments contained covenants by the assignee to pay the rent and observe the covenants in the lease.

In 1885 *Hinks* became bankrupt, and the rent of the said premises being in arrear, Mrs. *Newman*, the original lessor, brought an action against *Sturrock* for the amount due.

*Sturrock* thereupon sued *Benjamin* on his covenant, and *Benjamin* brought in *Verdi* on a third party notice, against whom judgment was given for 240*l.*

*Verdi* accordingly carried in a proof against the estate of the bankrupt *Hinks* for the 240*l.* and costs, and he also claimed to prove for a further sum estimated by him at 2000*l.* in respect of his contingent liability for the rent during the eight years remaining of the said term.

The proof for 240*l.* and costs was duly admitted, but the trustee in the bankruptcy rejected the claim for the future rent on the ground that the liability in question was incapable of being estimated.

From this decision *Verdi* now appealed.

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Section 37 of the Bankruptcy Act, 1886, after dealing with demands in the nature of unliquidated damages, provides by sub-section (3): "Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy."

And by sub-section (4):—"An estimate shall be made by the trustee of the value of any debt or liability provable as aforesaid, which by reason of its being subject to any contingency or contingencies, or for any other reason, does not bear a certain value."

And further, by sub-section (8):—"Liability shall for the purposes of this Act include any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether the breach does or does not occur, or is or is not likely to occur or capable of occurring before the discharge of the debtor, and generally it shall include any express or implied engagement, agreement, or undertaking, to pay, or capable or resulting in the payment of money or money's worth, whether the payment is, as respects amount, fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency or on two or more contingencies; as to mode of valuation capable of being ascertained by fixed rules, or as matter of opinion."

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*Yate-Lee* : for Mr. Verdi.

Mr. *Verdi* is entitled to prove for the contingent liability for future rent under section 37 of the Bankruptcy Act, 1883. The trustee has not disclaimed the lease, but he has assigned to another tenant. There is a contingent liability, for which *Verdi* is at liberty to carry in a proof for a proper amount. The liability is perfectly capable of being estimated. The Courts have held that almost anything may be estimated. In *Ex parte Blakemore, In re Blakemore* (L. R. 5 Ch. Div. 372 ; 46 L. J. Bank. 118 ; 36 L. T. 789), a widow was entitled, under the will of her husband, to an annuity during her life or widowhood, and it was charged upon property bequeathed by him to his sons, and was further secured by the joint and several bond of the sons. The sons filed a liquidation petition ; and it was held that “ the value of the contingency of the widow’s marrying again was capable of being fairly estimated, and that proof must be admitted for the value of the future payments as ascertained by an actuary.” And in *Ex parte Neal, In re Batey* (L. R. 14 Ch. Div. 579 ; 43 L. T. 264), by a separation deed between a husband and wife, the husband covenanted with trustees to pay to them an annuity of 350*l.*, during the joint lives of himself and his wife, for her benefit. The annuity was made determinable in case the wife should not lead a chaste life ; in case the husband and wife should resume cohabitation ; and in case the marriage should be dissolved in respect of anything done, committed, or suffered by the other party after the date of the deed. The annuity was to be proportionally diminished in the event of the wife becoming entitled to any income independent of the husband exceeding 350*l.* a year. After the execution of the deed the husband filed a liquidation petition : and it was held that “ the value of the annuity was capable of being fairly estimated, and was provable in the liquidation.” In giving judgment in that case, Lord Justice JAMES said : “ It was, I believe, because of those (former) decisions that the very wide words of section 31 of the Bankruptcy Act, 1869, were introduced (*see section 37 of the Bankruptcy Act, 1883*), which make every kind of debt or liability provable in bankruptcy, except ‘ demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise,’ and that whether the value of the liability is ‘ capable of being ascertained by fixed rules, or

assessable only by a jury, or as matter of opinion.' The present case is really governed by *Ex parte Blakemore* (L. R. 5 Ch. Div. 372), in which we held that the value of an annuity to a widow, defeasible on her marrying again, was capable of being fairly estimated, and was provable in bankruptcy. It seems to me that that decision really determines the present case. \* \* \* It appears to me that the person who says that there is not a provable debt must show that the value of the liability is incapable of being fairly estimated." Further, in the case of *Collyer v. Isaacs* (L. R. 19 Ch. Div. 342; 51 L. J. Ch. 14; 45 L. T. 567), "A debtor by bill of sale assigned for value to a creditor certain specified chattels at his place of business, 'and all other chattels which might be, or at any time thereafter be brought thereon in addition to or in substitution thereof.' The debtor became bankrupt, and after his order of discharge brought other chattels upon the premises. The creditor did not prove for his debt in the bankruptcy. It was held that the assignment of the after-acquired chattels, although absolute in form, amounted merely to a contract to assign, for the breach of which the assignor incurred a liability provable in his bankruptcy, and from which he was released by the order of discharge; that consequently the goods brought on the premises after the order of discharge could not be seized by the creditor under his bill of sale." And Lord Justice LUSH said: "The plaintiff executed a deed which was in form an assignment, but which in fact amounted to a contract that he would appropriate any chattels which he might bring upon the premises to an already existing security. That contract appears to me to be provided for by the 31st section of the Act. The words are as wide as language can possibly make them. No terms can be wider than those in which is given the definition of liability. This was certainly an engagement under which the plaintiff became liable in money's worth. That liability is declared by the same section to be a provable debt." In the present case the proper course for the trustee to adopt was under section 37, sub-section (4), of the Bankruptcy Act, 1883. The liability here is not incapable of valuation.

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*Colam*: for the trustee in the bankruptcy.

In the cases cited there has been a certain liability; it was only

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uncertain as to amount. The applicant in this case may never become liable for a single penny. In the result he may not be liable for anything. The present occupant of the premises pays his rent in advance. What is to become of the money awarded him? There is scarcely any ground to work upon here in estimating the value. In the case of *In re Linton, Ex parte Linton* (see *ante*, Volume II., page 179; L. R. 15 Q. B. D. 239), the Court of Appeal held that the future payment of alimony under an order of the Divorce Court was not capable of valuation.

CAVE, J. :

Judgment.

I am of opinion that in this case the trustee cannot avoid having an estimate made. The case of *In re Linton, Ex parte Linton*, is not a case in point. The effect of that decision is to show that where an order is made by the Divorce Court for the future payment of alimony by a husband, such payments are not capable of valuation, and cannot therefore be proved for in the event of the husband being adjudicated bankrupt, but such husband is liable to continue the payments notwithstanding the bankruptcy. The present case is one of those cases where the best must be done which can be done. The application must be granted, and the matter must be referred back to the trustee to make an estimate of the value according to section 37, sub-section (4), of the Bankruptcy Act, 1883. The trustee must also pay the costs.

*Application allowed with costs.*

Solicitors : *Frederick Taylor*, for Mr. Verdi.

*A. Leslie*, for the trustee in the bankruptcy.

Cases relied upon or referred to :—

*Ex parte Blakemore, In re Blakemore*, L. R. 5 Ch. Div. 372 ;  
 46 L. J. Bank. 118 ; 36 L. T. 783.

*Ex parte Neal, In re Batey*, L. R. 14 Ch. Div. 579 ; 43 L. T.  
 264.

*Collyer v. Isaacs*, L. R. 19 Ch. Div. 342 ; 51 L. J. Ch. 14 ;  
 45 L. T. 567.

*In re Linton, Ex parte Linton*, see *ante*, Volume II., page  
 179, L. R. 15 Q. B. D. 239.



## PRACTICE.

IN RE GENESE, EX PARTE GILBERT.

*Bankruptcy Act, 1883, section 27.**Examination of Witness—Privilege—Refusal to answer Question on the Ground that it may tend to Criminate.*

*Held:* That where a question is in form an innocent one, it is not a sufficient ground of refusal to answer for a witness to say that he believes his answer to such question will or may criminate him: but he must satisfy the Court that there is a reasonable probability that it would or might do so.

A witness in such a case must satisfy the Court by some fact outside the question that his answer will or may put him in jeopardy.

COURT OF  
APPEAL.BEFORE THE  
MASTER OF  
THE ROLLS.  
BOWEN, L.J.,  
FRY, L.J.  
1886.

July 10th.

THIS was an appeal on behalf of the trustee in the bankruptcy of *Genese*, against a decision of the Registrar allowing the objection of one *Saville* to answer a question put to him as witness under section 27 of the Bankruptcy Act, 1883, on the ground that his answer might tend to expose him to a criminal prosecution.

Section 27, subsection (1), provides that "The Court may, on the application of the official receiver or trustee, at any time after a receiving order has been made against a debtor, summon before it the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the Court may deem capable of giving information respecting the debtor, his dealings or property, and the Court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings or property." The succeeding subsections further deal with the discovery of the debtor's property.

The witness *Saville* was summoned for examination by the trustee in the bankruptcy under the provisions of the above section, and a question was then put to him as to whether he had not been in partnership with the bankrupt *Genese*.

This question he declined to answer on the ground that such answer might tend to criminate him.

The witness had on a previous occasion in certain other proceedings made an affidavit in which he had stated that he had not been

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in partnership with the bankrupt at all, and for that statement a prosecution for perjury was commenced against him, but he was acquitted.

When objecting to answer the present question the witness did not allege that he had on any other occasion, save the one referred to, made a similar statement on oath.

The Registrar nevertheless allowed the objection, and from that decision the trustee in the bankruptcy now appealed.

*H. Kisch*: for the trustee in the bankruptcy.

The witness *Saville* was alleged to be a partner of the debtor. The question he refused to answer was this:—Putting a bill into his hands I said, “Was that bill discounted by you on the terms that you and *Genese* should divide the loss and share the profit?” He declined to answer the question. He said, “I decline to answer on the ground that they prosecuted me for perjury before.” We have nothing to do with any other prosecution. If a witness can refuse to answer a question like this, he may refuse to answer anything.

*R. Vaughan Williams*: for the witness *Saville*.

It is true that *Saville* was prosecuted before because he did state that he was not a partner of *Genese*. He thinks that the object is to institute further proceedings. In objecting to answer the question, *Saville* meant to show that he thought they were about to institute fresh proceedings in respect of answers he had given. He says, “This answer will lay me open to a prosecution for perjury in respect of something I have said before.”

[THE MASTER OF THE ROLLS.—The objection to that is that the other side say he had been already prosecuted.]

[BOWEN, L.J.—You must show that the man would be in reasonable jeopardy by answering. If the man made the statement and was prosecuted, he would not be in jeopardy.]

[THE MASTER OF THE ROLLS.—The question of itself does not intimate that there was any danger.]

A witness need not demonstrate that he would be in jeopardy. He could only demonstrate his jeopardy by admitting his guilt.

[BOWEN, L.J.—Here the other side only allege that this witness said the thing once in an affidavit. If you can show that he said it more than once it will assist you materially.]

I submit that the witness has only to satisfy the Court that he has a reasonable ground of fear. He has not to show any particular occasion. He says, "These people have already had a shot at me for saying that I was not a partner of *Genese*, and I have a reasonable inference that they are seeking to have another." The object of the question was to get fresh evidence for a prosecution. In the case of *Lamb v. Munster* (L. R., 10 Q. B. D. 110; 52 L. J., Q. B. 46; 47 L. T. 442), Mr. Justice FIELD said, "The point raised is important, for the principle of our law, right or wrong, is, that a man shall not be compelled to say anything which criminate himself. Such is the language in which the maxim is expressed. The words 'criminate himself' may have several meanings, but my interpretation of them is, 'may tend to bring him into the peril and possibility of being convicted as a criminal.' It is said that a man is not bound to do so. There have been various authorities on the question how the point is to be raised. Suppose a witness in the box declines to answer a question. He is asked why? He answers, 'Because it may tend to criminate me.' But the judge tells him that he must go further, and swear that he believes the answer will tend to criminate him. He answers, 'I do not know, but I believe it may do so.' The judge tells him that he must go further and say that he is advised that the answer may tend to criminate him. He perhaps replies, 'I have no one to advise me in whose advice on the subject I should trust.' Then it becomes the duty of the judge to look at the nature and all circumstances of the case, and the effect of the question itself, to see whether it is a question the answer to which will really tend to criminate the witness. If he said, 'I think it may,' or, 'It may,' or, 'It might,' or, 'I believe it will,' or, 'I am advised it will,' I should not regard the form of words, but look to see whether answering would be likely to have or probably would have such a tendency to criminate,

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and bearing in mind the cardinal rule that a man shall not be compelled to criminate himself, I should almost prefer a man to be careful and say the answer might tend to criminate, and I should be slow to commit him to prison for not doing that which the law says he is not bound to do."

THE MASTER OF THE ROLLS (LORD ESHER):

Judgment.

In this case a witness was being examined before the registrar. A question was asked, and that question the witness declined to answer on the ground that it might tend to criminate him. He further stated the way in which he might so be injured in that it might lay him open to an indictment for perjury. It was also stated that he had been indicted for perjury and had been acquitted. The witness said that he believed his answer would lay him open to an indictment, and those were all the facts before the registrar. The question is whether the registrar was right in allowing the objection. We must deal with the facts which were before the registrar and decide the case as he ought to have decided it. Now, as was pointed out by Lord Chief Justice COCKBURN in the case of *Reg. v. Boyes* (1 B. & S. 311), there are some questions which in themselves contain evidence of jeopardy to which the witness would be exposed if he answered the question in one way. But there are other questions which in their form and in the absence of anything else appearing *aliunde* are perfectly innocent. The question here, which in effect is simply whether a man had agreed to divide a commission with some one else, is in form as innocent a question as can well be imagined. It requires something outside it to show that the answer of the witness might put him in jeopardy. In such a case is it enough for a witness to state that he *believes* his answer might tend to criminate him in order to excuse him from answering at all? Now the cases of *Reg. v. Boyes* (1 B. & S. 311), and *Ex parte Reynolds, In re Reynolds* (L. R. 20 Ch. Div. 294; 51 L. J. Ch. 756; 46 L. T. 508), and also in my opinion the case of *Lamb v. Munster* (L. R. 10 Q. B. D. 110; 52 L. J. Q. B. 46; 47 L. T. 442), say that it is not enough. When the question is in form an innocent one it is not enough for a witness to say that he believes his answer to it will criminate him. He must satisfy the Court that there is a reasonable probability that his

answer will or may criminate him. He must satisfy the Court by some fact outside the question that his answer will or may put him in jeopardy. What are the facts shown in this case? It was said in the present case that the witness had on a previous occasion made in an affidavit in a judicial proceeding a statement which might be inconsistent with his answer to the question put to him. But at the same time it was shown that he had already been tried and acquitted with regard to the statement in that affidavit. As to that affidavit, therefore, on which he had been tried and acquitted, he could not be in jeopardy. The registrar could not say that he ought not to answer by reason of that affidavit. The registrar, however, does appear to have decided on that affidavit and that is not enough. But it is said that the witness might have stated that he had made another affidavit of the same kind in some other proceeding. All I can say is that the witness never did state it. There was no other fact before the registrar except the one affidavit, and the registrar ought not to have been satisfied that there was reasonable ground that the evidence would criminate. On these facts the registrar's decision cannot be upheld. It is in conflict with the authorities, and I am of opinion that the language used by the judges in *Lamb v. Munster* (L. R. 10 Q. B. D. 110; 52 L. J. Q. B. 46; 47 L. T. 442), is in substance the same as that which was used in *Reg. v. Boyes* (1 B. & S. 311), and in *Ex parte Reynolds, In re Reynolds* (L. R. 20 Ch. Div. 294; 51 L. J. Ch. 756; 46 L. T. 508), and that the judges were only applying the rule previously laid down. This case must therefore go back to the registrar to continue the examination. If upon the next occasion the witness does satisfy the registrar by what is evidence on which the Court may act, that by reason of having made a similar affidavit in some other proceeding or otherwise he will be put in danger, the registrar may rule that the objection is well founded. All we say is that as to the evidence at the time when he allowed the objection the registrar was wrong. The witness having taken an untenable objection, this appeal must be allowed with costs.

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 GENESE,  
 EX PARTE  
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BOWEN, L.J., and FRY, L.J., concurred.

*Appeal allowed with costs.*

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IN RE  
GENESE,  
EX PARTE  
GILBERT.

Solicitors : *A. E. Rosenthal*, for the trustee in the bankruptcy.  
*Todd, Dennis and Lamb*, for the witness Saville.

Cases relied upon or referred to :—

*Lamb v. Munster*, L. R. 10 Q. B. D. 110 ; 52 L. J. Q. B. 46 ;  
47 L. T. 442.

*Reg. v. Boyes*, 1 B. & S. 311.

*Ex parte Reynolds, In re Reynolds*, L. R. 20 Ch. Div. 294 ;  
51 L. J. Ch. 756 ; 46 L. T. 508.

## PRACTICE.

COURT OF  
APPEAL.

BEFORE THE  
MASTER OF  
THE ROLLS,  
BOWEN, L.J.,  
FRY, L.J.  
1886.

July 30th.

IN RE CHASE, EX PARTE COOPER.

*Bankruptcy Act, 1883, section 28.*

*Discharge of Bankrupt—Suspension for Three Months—Discretion of Registrar—  
Appeal by Creditor on Ground of Leniency.*

*Held* : That where all the facts have been brought to the notice of the Registrar and he has exercised his discretion as to the terms on which a bankrupt should obtain his discharge, the Court of Appeal will not interfere with such decision on an allegation that the punishment imposed was too lenient and unless it is perfectly clear that the decision was wrong.

THIS was an appeal on behalf of one *Richard Cooper*, a creditor in the bankruptcy of *Herbert Chase*, against an order of Mr. Registrar Giffard, by which he suspended the discharge of the said bankrupt for three months.

The ground of the appeal was that the order so made by the learned registrar was too lenient.

It was alleged that the bankrupt had brought himself within the provisions of section 28, sub-section 3 (c) and (e) of the Bankruptcy Act, 1883, by contracting debts without reasonable ground of

expectation of being able to pay them ; and also by frivolously and vexatiously defending an action properly brought against him.

All the facts were brought to the notice of the registrar, and he, in his discretion, suspended the bankrupt's discharge for three months.

From that decision the creditor *Cooper* now appealed.

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COOPER.

Section 28 of the Bankruptcy Act, 1883, which deals with the discharge of a bankrupt, provides :—

“(2.) On the hearing of the application the Court shall take into consideration a report of the official receiver as to the bankrupt's conduct and affairs, and may either grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time, or grant an order of discharge subject to any condition with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property ; Provided that the Court shall refuse the discharge in all cases where the bankrupt has committed any misdemeanor under this Act or Part II. of the Debtors Act, 1869, or any amendment thereof, and shall, on proof of any of the facts hereinafter mentioned, either refuse the order, or suspend the operation of the order for a specified time, or grant an order of discharge, subject to such conditions as aforesaid.

“(3.) The facts hereinbefore referred to are— \* \* \* (c) That the bankrupt has contracted any debt provable in the bankruptcy, without having at the time of contracting it any reasonable or probable ground of expectation (proof whereof shall lie on him) of being able to pay it. \* \* \* (e) That the bankrupt has put any of his creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against him.”

*Cranstoun* : for Captain Cooper.

The registrar was too lenient. The debtor has brought himself within section 28, sub-section 3 (c) and (e) of the Act.

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 EX PARTE  
 COOPER.

[THE MASTER OF THE ROLLS. The period of suspension must be a question of discretion.]

I contend that the registrar did not really take into account the offence in (e). The debtor was one of a firm of tea-brokers. They got into difficulties and their bankers pressed them. Captain *Cooper* lent 5000*l.*, and the bankrupt gave a promissory note. On that note an action was brought in October, 1885. There was no answer to the action. There was no defence whatever, yet the bankrupt set up a defence of fraud and collusion; that there had been no consideration for the note; and that he had been induced to make it by fraud. Those charges were afterwards disproved and withdrawn at the public examination of the bankrupt. He got leave to defend in the action under Order XIV. on bringing the money into Court, but did not do so, and judgment was obtained. There was no answer whatever to this action, which was properly brought against him, and in acting as he did the bankrupt raised a frivolous and vexatious defence. What I contend is that the registrar exercised his discretion on the ground of the debtor contracting debts without reasonable ground of expectation of being able to pay them, but not on this question of the vexatious defence. All the facts were put before the registrar, and what he said was that the defendant seemed to have something to say in the matter. I submit that the proper order to make in this case was one dealing with the future earnings of the bankrupt.

[THE MASTER OF THE ROLLS. If this man has broken sub-section 3 (e), what ought to be done with him is a matter of discretion. You have no right to any particular order. It is a mere question of discretion.]

By this vexatious defence the bankrupt has put Captain *Cooper* to much unnecessary expense.

*Woodfall*: for the bankrupt was not called upon.

THE MASTER OF THE ROLLS (LORD ESHER):

Judgment.

I am of opinion that in this case all the facts were before the



registrar, and he came to the conclusion that the punishment which he pronounced was a right one. That is, that under the circumstances of the case it would be the proper course to suspend the discharge of the bankrupt for three months. It is a matter entirely for his discretion, and although we could overrule what he has done, we will not do so unless a clear case is made out that he has gone decidedly wrong. That case is by no means clear enough here, and the appeal must be dismissed with costs.

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IN RE  
CHASE,  
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COOPER.

BOWEN, L.J., and FRY, L.J., concurred.

*Appeal dismissed with costs.*

Solicitors: *J. Sykes*, for Captain Cooper.

*Humphreys & Co.*, for the bankrupt.

## PRACTICE.

IN RE FRYER, EX PARTE FRYER.

*Bankruptcy Act, 1883, section 103, sub-section (5).*

*Judgment Debtor—Receiving Order in Lieu of Committal—Failure of Co-respondent in Divorce Suit to comply with Order for payment of Damages—"Judgment Creditor"—Debtors Act, 1869, section 5.*

COURT OF  
APPEAL.  
BEFORE THE  
MASTER OF  
THE ROLLS,  
BOWEN, L.J.,  
FRY, L.J.  
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*Held:* (1) That the Court has jurisdiction to make a receiving order, in lieu of a committal, against a judgment debtor, under section 103, sub-section (5) of the Bankruptcy Act, 1883, only on the application of a person who is strictly speaking a "judgment creditor."

Such receiving order cannot be made, therefore, on the application of every person who is entitled to apply to the Court under section 5 of the Debtors Act, 1869.

(2) That where an order is made in the Divorce Court directing the co-respondent to pay to the husband, the petitioner in the suit, the amount given as damages forthwith for the purpose of settlement on the children of the marriage, such husband is not a "judgment creditor" of the co-respondent within the meaning of section 103, sub-section (5), of the Bankruptcy Act.

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FRYER.

(3) That where a judgment debtor makes default in payment of the judgment debt, the Court has power of committal under section 5 of the Debtors Act, 1869, if proof is given that such debtor has had the means of paying part of the said debt even though he has not had the means of paying the whole amount.

THIS was an appeal from an order of Mr. Justice CAVE making a receiving order against the debtor *Fryer*.

This receiving order was made under section 103, sub-section (5) of the Bankruptcy Act, 1883, and the case raised the question whether a receiving order could be made under the said action on the application of a husband, the petitioner in a divorce suit, against a co-respondent, who had made default in payment of damages ordered by the Divorce Court to be paid by him to the petitioner.

The debtor *Fryer* was an officer in the army, and on April 5th, 1884, damages to the amount of 1,000*l.* were given against him as co-respondent in a certain divorce suit.

A decree *nisi* was at the same time made by the Judge for the dissolution of the marriage, and it was ordered that the said co-respondent should within fourteen days of the service of the order on him, pay into Court the 1,000*l.*

This was not done, and in October, 1884, the decree *nisi* was made absolute.

On August 11th, 1885, another order was made to the effect that the order of April 5th, 1884, be varied, and that the co-respondent *Fryer* do pay to the husband, the petitioner in the said suit, the 1,000*l.* forthwith for the purpose of settlement on the children of the marriage.

*Fryer* having failed to pay any part of the 1,000*l.*, the husband, on May 31st, 1886, issued a judgment summons against him.

On the hearing of this summons Mr. Justice CAVE, with the consent of the applicant, made a receiving order against *Fryer* in lieu of committing him, under section 103, sub-section (5), of the Bankruptcy Act, 1883, which provides that: "Where, under section 5 of the Debtors Act, 1869, application is made by a judgment creditor to a Court having bankruptcy jurisdiction, for the committal of a judgment debtor, the Court may, if it thinks fit, decline to commit, and in lieu thereof, with the consent of the judgment creditor, and on payment by him of the prescribed fee,

make a receiving order against the debtor. In such case the judgment debtor shall be deemed to have committed an act of bankruptcy at the time the order is made."

From the receiving order so made the debtor *Fryer* now appealed.

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FRYER,  
EX PARTE  
FRYER.

*Channel, Q.C. (Sidney Woolf with him):* for Fryer.

There was no jurisdiction to make this receiving order. I say first that the order of the Divorce Court for payment of the 1,000*l.* to the husband did not constitute the husband a "judgment creditor" of the co-respondent. In the case of *Ex parte Muirhead, In re Muirhead* (L. R. 2 Ch. Div. 22; 45 L. J. Bank. 65; 38 L. T. 808), "In a divorce suit a decree for a divorce was made, and the co-respondent was ordered to pay into the registry 5,000*l.*, the amount of damages assessed by the jury. This decree was made absolute. The co-respondent being resident abroad, the order for payment could not be enforced against him, and an order was obtained from the Divorce Court rescinding so much of the decree as ordered payment into the registry, and ordering the 5,000*l.* to be paid to the husband, he undertaking to pay it into the registry to abide the further order of the Court. The husband then commenced proceedings in bankruptcy against the co-respondent. It was held that the 5,000*l.* did not constitute a good petitioning creditor's debt." That case shows that the husband here could not have presented a petition in bankruptcy. It is an anomaly if a man in such a position can by a side wind ask for a committal, and in lieu get a receiving order made. Moreover, the evidence does not show that since the date of the order the co-respondent has had the means of paying the whole of the 1,000*l.* He has, therefore, not made default within the meaning of section 5 of the Debtors Act, 1869. A man cannot be committed without proof of means to the extent of the sum ordered against him.

*E. Cooper Willis, Q.C. (Herbert Reed with him):* for the husband.

The real question in this case is whether the husband is a judgment creditor. Is there a debt due to him? By the order of April 5th, 1884, *Fryer* was ordered to pay the 1,000*l.* into Court within fourteen days. That was a judgment of the Court for the

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payment of the money. Then on August 11th, 1885, the order was varied as to payment into Court, and *Fryer* was directed to pay the 1,000*l.* to the petitioner forthwith for the purpose of settlement on the children of the marriage. That is very different to the case of *Ex parte Muirhead, In re Muirhead* (L. R. 2 Ch. Div. 22; 45 L. J. Bank. 65; 33 L. T. 308). There the Court held that the husband was a mere conduit pipe or receiver, and for that reason was not a good petitioning creditor. In *Patterson v. Patterson* (L. R. 2 P. & D. 189), "Damages having been given against a co-respondent, an order was made that the amount should be paid into the registry of the Court within a certain time. Before such order had been made, the co-respondent became a bankrupt, and a trustee of his property was appointed. The damages were not paid into the registry, nor could they be proved under the bankruptcy. In order to facilitate the latter step, the Court rescinded its former order, and directed that the damages should be paid to the petitioner himself." And in *Pritchard v. Pritchard* (L. R. 2 P. & D. 53), "In a suit for dissolution of marriage the jury found a verdict for the petitioner, and gave damages against the co-respondent. The Court made a decree *nisi*. Subsequently, on affidavit that the co-respondent had removed his furniture and other effects from his residence, the Court made a peremptory order that the damages should be paid to the petitioner within two days, and that if they were not paid within that period, a writ of *fi. fa.* should issue forthwith."

THE MASTER OF THE ROLLS (LORD ESHER):

Judgment.

In this case the appellant is an officer in the army who was a co-respondent in the Divorce Court. A decree was made there for a dissolution of marriage, and damages were assessed by the jury against such co-respondent to the amount of 1,000*l.* There was an order of the Divorce Court after the verdict that the 1,000*l.* should within fourteen days be paid into Court, which order was afterwards varied, and the co-respondent was directed to pay the 1,000*l.* to the husband, the petitioner in the suit, for the purpose of settlement on the children of the marriage. That being so, and the money not being paid, a summons was taken out against the co-respondent before Mr. Justice CAVE. The application was

made by the husband, and upon that summons Mr. Justice CAVE has made a receiving order under section 103, sub-section (5), of the Bankruptcy Act, 1883. The question is whether Mr. Justice CAVE had power to do so. It is a question whether the case was brought within the words of section 103, sub-section (5). That section says that "Where, under section 5 of the Debtors Act, 1869, application is made by a judgment creditor to a Court having bankruptcy jurisdiction, for the committal of a judgment debtor, the Court may, if it thinks fit, decline to commit, and in lieu thereof, with the consent of the judgment creditor, and on payment by him of the prescribed fee, make a receiving order against the debtor." It is essential that an application under this section should be made by a judgment creditor, and the question is whether in this case the application within that section was made by a "judgment creditor." That raises the question whether this husband can within the section be called a "judgment creditor." What is the relation of this husband constituted by order of the Divorce Court? What is the relation between a husband and the co-respondent in a divorce suit against whom such an order as this has been made for the payment of damages? That depends upon the construction of the Divorce Court Act. When a verdict for damages has been given against a co-respondent in the Divorce Court the next step is not the same as after a verdict in a common law action in the Queen's Bench Division. In a common law action the entry of judgment after verdict is a purely ministerial act done without any interference by the Court, with the legal result that a writ may at once be placed in the hands of the sheriff for execution. But after verdict in the Divorce Court it is not a merely ministerial act. Application must be made to the judge, who is exercising a judicial authority, and he has the power to make an order to dispose of the damages that none of them shall go to the husband at all. The judge can order the amount to be settled on the divorced wife, or on the children, or it is true, he may make an order that the damages shall be paid to the husband for his own personal benefit. The same result does not follow, therefore, as in a common law court, but an order of the Court is required to enforce the verdict. What is the relation established between the co-respondent who has been cast in the damages and

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the husband? If an order is made that the money be paid to the husband that he may bring it before the Court in order that the Court may deal with it, the question was considered in *Ex parte Muirhead, In re Muirhead* (L. R. 2 Ch. Div. 22; 45 L. J. Bank. 65; 33 L. T. 303). That is a judgment of the Court of Appeal, and if it is applicable to this case we must follow it. In that case it was held that the sum so ordered to be paid did not constitute a good petitioning creditor's debt on the part of the husband against the co-respondent, and the principle of the decision was this, that by such an order the husband was constituted an officer of the Court to collect the money for the Court from the co-respondent in order that the Court might deal with it. That is the nature of the relation between the husband and the co-respondent when an order is made such as is made in the present case. It is not necessary to determine what the relation would be if an order had been made that the damages should be paid to the husband for his own personal benefit. Such being the relation in the present case, can it be that under section 103, sub-section (5), the husband is a "judgment creditor" within the ordinary meaning of the words? That section must be construed according to the ordinary meaning of the words in the English language. There is nothing which authorizes the Court to alter the ordinary meaning of the words, or tends to show that the words are not used in their ordinary sense, and it is impossible to say that a person who is thus constituted an officer of the Court for the purpose of collecting the money is in the ordinary meaning of the English language a "judgment creditor." Therefore in the present case no application was made by a judgment creditor, and Mr. Justice CAVE had no jurisdiction to make a receiving order against the co-respondent. But under the Debtors Act, 1869, he could deal with him. Under the Debtors Act he had jurisdiction to deal with the case in the ordinary way. That follows our decision in *In re Linton, Ex parte Linton* (see *ante*, Volume II., page 179: L. R. 15 Q. B. D. 239). The co-respondent was ordered to pay 1,000*l.* The evidence showed that he had been able to pay a part of it, and he had neglected to do so, and that brought him within the power of the Court. I abjure and reject entirely the argument that if the debtor has not had the means of paying all the 1,000*l.*, but has had the means of

paying a part of it, the Court has not jurisdiction to commit him because he has not had the means of paying the whole. The debtor was bound by the order to pay each pound of the sum which he was ordered to pay, and if he neglected to pay any part which he had the means of paying, the Court had jurisdiction to commit him for the neglect. In this case it is for us to make the order which Mr. Justice CAVE would have made. The proper order seems to be that the debtor pay 100*l.* within one month, and then to continue to pay monthly 7*l.* 10*s.*, until he has paid the 1,000*l.*

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BOWEN, L.J. :

I am of the same opinion. The jurisdiction of Mr. Justice CAVE in making this receiving order depends upon whether the application was made to him by a judgment creditor. The question is whether a husband who has had an order of this kind made is a judgment creditor under this section. The effect of the decision of the Court of Appeal in *Ex parte Muirhead, In re Muirhead* (L. R. 2 Ch. Div. 22; 45 L. J. Bank. 65; 33 L. T. 309) is, that when an order of this kind is made by the Divorce Court for the payment of damages by a co-respondent to the husband, no debt at law or in equity to the husband is created, but he is simply constituted the receiver of the Court for the completion of the order. Can it be said that a husband who is placed in this position for the benefit of his children is a "judgment creditor" of the co-respondent within the meaning of section 103, sub-section (5), of the Bankruptcy Act? Section 5 of the Debtors Act, 1869, in no way defines the persons who are to make the application for a committal under that Act. It only defines the offences which are to be punished by committal, and it would seem that application for a committal might be made by a person who did not strictly fill the character of a "judgment creditor." Section 103 of the Bankruptcy Act, 1883, transfers to the Bankruptcy Court the jurisdiction with regard to committal under section 5 of the Debtors Act, 1869. It was argued that the intention was to give the power of making a receiving order on the application of any person who was entitled under the Debtors Act to apply for a committal. I clearly think, however, that in a clause of this description—which is a

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quasi-penal clause—the Court ought not to go beyond the ordinary meaning of the words unless it can see some strong reason for doing so. No reason is assigned for going beyond the ordinary meaning of the words, except the suggestion that the words “judgment creditor” are here used in a popular sense. To my mind the sounder view, and the one which I hold, is that only a “judgment creditor” in a strictly legal sense is meant. But though the husband is not a judgment creditor he is entitled to apply under section 5 of the Debtors Act, 1869, and with regard to the order which should be made I entirely agree with what the Master of the Rolls has said.

FRY, L.J. :

I am of the same opinion. The question is whether the judge had power to make a receiving order in lieu of an order of committal. Does the language of section 103, sub-section (5) of the Bankruptcy Act, 1883, apply to the present case? Was the applicant in the present case a judgment creditor? A judgment creditor can only exist where there is a debt. Here the applicant is a husband who in the Divorce Court has obtained an order that the co-respondent in the suit should pay to him the 1,000*l.* damages forthwith for the purpose of settlement on the children of the marriage. The husband has no interest whatever. He has been appointed as a receiver for the Court, and in my opinion we should be frittering away the decision in *Ex parte Muirhead*, *In re Muirhead* (L. R. 2 Ch. Div. 22; 45 L. J. Bank. 65; 33 L. T. 303), if we held that there was a distinction between the cases. There is not in the legal or popular meaning any debt due to the husband from the co-respondent, and the husband is not a judgment creditor within the meaning of the section. It is unnecessary to express any opinion on the question whether the co-respondent has had means to pay though he has not been in a position to pay the whole 1,000*l.* I do not intend, however, to intimate any dissent from the view taken by the Master of the Rolls, and I agree with him as to the proper order to be made in this case.

*Appeal allowed, without costs, and order made as above.*



Solicitors: *Crowders & Vizard*, for the appellant Fryer.  
*Thompson & Son*, for the husband.

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Cases relied upon or referred to:—

*Ex parte Muirhead, In re Muirhead*, L. R. 2 Ch. Div. 22;  
 45 L. J. Bank. 65; 33 L. T. 303.

*Patterson v. Patterson*, L. R. 2 P. & D. 189.

*Pritchard v. Pritchard*, L. R. 2 P. & D. 53.

*In re Linton, Ex parte Linton*, see ante, Volume II., page  
 179; L. R. 15 Q. B. D. 239.

## PRACTICE.

### IN RE IDE, EX PARTE IDE.

*Bankruptcy Act, 1883, section 4, sub-section 1 (g).*

*Final Judgment against Partnership Firm—Partner not served or appearing—  
 Bankruptcy Notice—Rules of the Supreme Court, 1883, Order XLII., Rule 10.*

*Held:* That a creditor who has obtained a final judgment cannot under section 4, sub-section 1 (g), of the Bankruptcy Act, 1883, issue a bankruptcy notice against the judgment debtor, unless such creditor is also in a position to issue immediate execution on the judgment.

Thus, where final judgment is obtained against a firm, a bankruptcy notice cannot be issued against a member of such firm who has not been served with the writ, and has not appeared, or admitted that he is or has been adjudged to be a partner, unless under Order XLII., Rule 10, of the Rules of the Supreme Court, 1883, leave to issue execution against such partner has been obtained.

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 BEFORE THE  
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 THE ROLLS,  
 BOWEN, L.J.,  
 FRY, L.J.  
 August 6th.

THIS was an appeal on behalf of one *Leon W. Ide* from the decision of the registrar making a receiving order against him.

The case raised the question whether a person who has obtained judgment, but is not entitled to issue execution, can serve a bank-

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ruptcy notice under section 4, sub-section 1 (g), of the Bankruptcy Act, 1883.

On January 4th, 1886, a writ was issued against *Ide & Co.* by Messrs. *Toy & Brown* to recover the sum of 167*l.*

Appearance was entered by *Edward Godfrey Ide*, one of the partners of the firm. *Leon W. Ide*, the other partner, was not served, and did not appear.

On January 23rd, 1886, final judgment was obtained under Order XIV. against the firm; and upon that, on April 19th, 1886, a bankruptcy notice, claiming payment of the debt, was issued under section 4, sub-section 1 (g), of the Bankruptcy Act, 1883, against — *Ide v. — Ide*, trading as *Ide & Co.*, and served on the firm.

On July 6th, 1886, the debt not having been paid, a bankruptcy petition was presented against the firm.

This petition was served on *Leon W. Ide*, who opposed the making of a receiving order against him.

The learned registrar, however, made the receiving order, and from that order *Leon W. Ide* now appealed.

Section 4, sub-section 1, of the Bankruptcy Act, 1883, provides that a debtor commits an act of bankruptcy \* \* \* (g) "If a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him in England, or, by leave of the Court, elsewhere, a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the Court that he has a counter-claim, set-off, or cross-demand, which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained."

And by Order XLII., Rule 10, of the Rules of the Supreme Court, 1883:—

“Where a judgment or order is against a firm, execution may issue:

“(a.) Against any property of the partnership:

“(b.) Against any person who has appeared in his own name under Order XII., Rule 15, or who has admitted on the pleadings that he is, or has been adjudged to be, a partner:

“(c.) Against any person who has been served, as a partner, with the writ of summons, and has failed to appear.

“If the party who has obtained judgment or an order claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the Court or a Judge for leave so to do; and the Court or Judge may give such leave if the liability be not disputed, or if such liability be disputed, may order that the liability of such person be tried and determined in any manner in which any issue or question in an action may be tried and determined.”

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*Herbert Reed*: for *Leon W. Ide*.

*Edward Godfrey Ide* was personally served with the writ, and he alone appeared. There was no service on any other person. Assuming there was a judgment against the firm, execution can only issue against *Leon W. Ide* under Order XLII., Rule 10. You cannot issue execution against a man because you have got judgment against a firm except under the rule. If you cannot issue execution you cannot issue a bankruptcy notice. Section 4, sub-section 1 (g), shows this, which says: “If a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, &c.” The person issuing the notice must be in a position to issue execution. In the case of *In re Woodall, Ex parte Woodall* (see *ante*, Volume I., page 201; L. R. 13 Q. B. D. 479), Lord Justice BAGGALLAY said: “The question is, whether the respondent is a ‘creditor’ within the meaning of sub-section

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1 (g). The receiving order was made on the assumption that she, as the executrix of the deceased judgment creditor, was in effect a creditor who had obtained a final judgment against the debtor. The objection is that, as she is not the person who actually obtained the final judgment, it is essential that she should first have obtained leave from the Court, under Rule 23 of Order XLII., to issue execution on the judgment. It is contended that there is nothing in sub-section 1 (g) to limit the generality of the expression, 'a creditor who has obtained final judgment,' and that it must include the representative of the original creditor after his death, and his assignee. On the other hand, it is contended by the appellant that the representative of the person who originally obtained the final judgment does not fill the character of creditor under sub-section 1 (g) if he has not obtained leave under Rule 23 to issue execution. If it were not for the words which immediately follow, 'and execution thereon not having been stayed,' I think there would have been strong ground for adopting the first view. But those words tend to show that the creditor spoken of must be a person who is in a position to issue execution upon the final judgment." The creditor suing out the notice must be a person who can issue execution. The same was also decided here in the recent case of *In re Keeling, Ex parte Blanchett* (see *ante*, page 157; L. R. 17 Q. B. D. 808). But there really wants no authority except the section itself, which clearly points to the same thing. Under Order XLII., Rule 10, if the judgment debtor disputes the liability, the Judge will direct an issue as to whether he was a partner or not. (Counsel also referred to *Ex parte Young, In re Young*, L. R. 19 Ch. Div. 124; 51 L. J. Ch. 141; 45 L. T. 493; *Jackson v. Litchfield*, L. R. 8 Q. B. D. 474; 51 L. J. Q. B. 327; 46 L. T. 518.)

*F. C. Willis* : for the petitioning creditor.

The registrar was satisfied that *Leon W. Ide* was a partner.

[THE MASTER OF THE ROLLS : The point against you is, assuming the partnership, it is said that judgment was only against the firm, and execution cannot be issued against this man without leave.]

Service as a partner is dealt with by Order IX., Rule 6, which provides that, "Where persons are sued as partners in the name of their firm, the writ shall be served either upon any one or more of the partners, or at the principal place within the jurisdiction of the business of the partnership, upon any person having, at the time of service, the control or management of the partnership business there; and, subject to these rules, such service shall be deemed good service upon the firm."

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[FRY, L.J.: Good service "upon the firm."]

Then by Order XLII., Rule 10, if a judgment is against a firm execution may issue against the firm's property. If *Leon W. Ide* was a partner, execution issued against the firm would be execution issued against him.

[THE MASTER OF THE ROLLS.—The rule says, "Against any person who has appeared in his own name, or who has admitted on the pleadings that he is, or who has been adjudged to be a partner."]

If I can issue execution against a firm I can make any party to the firm a bankrupt.

[BOWEN, L.J.—In that case you give no meaning to Order XLII., rule 10 (c).]

THE MASTER OF THE ROLLS (LORD ESHER):

In this case a final judgment has been obtained against *Ide & Co.*, Judgment. that is, against a firm. Whether it was obtained rightly or wrongly it is not necessary to consider now. Judgment was obtained, and that being so, under Order XLII., Rule 10, execution could issue against the property of the firm. It is argued by Mr. Willis that execution could also issue against the private property of one member of the firm, because under Order IX., Rule 6, the firm was served with the writ, and service on the firm was service on him. That is an argument which we must immediately overrule. It would at once make Rule 10 (c) of Order XLII. useless. Under

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Order XLII., execution cannot issue without leave except against any person who has appeared in his own name, or who has admitted on the pleadings that he is, or has been adjudged to be a partner: or (c), "against any person who has been served, as a partner, with the writ of summons and has failed to appear." The position of *Leon W. Ide* was this, he was not served within rule 10 (c). Execution against his private goods could not issue without leave. Although there was a judgment against the firm, execution could not issue against him without leave. In that case is he a person against whom a bankruptcy notice can be issued under section 4, subsection 1 (g) of the Bankruptcy Act? That is, What is the construction of section 4, subsection 1 (g)? The words of the section are, "If a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, &c." Here, it is true, execution has not been stayed, and so far he is within the section. But is there not a necessary implication? Must not the judgment be one on which execution could be issued immediately unless stayed? Here execution cannot go against *Leon W. Ide* immediately. It cannot go without leave. It is not therefore such a judgment in respect of which a bankruptcy notice could be issued. The opinion which I now express is in accordance with that expressed in *In re Woodall, Ex parte Woodall* (see *ante*, Volume I., page 201, L. R. 13 Q. B. D. 479), and in *In re Keeling, Ex parte Blanchett* (see *ante*, page 157, L. R. 17 Q. B. D. 303), although the point may not then have been actually decided. This appeal must, therefore, be allowed. The receiving order will be discharged, and the petition dismissed, with costs.

BOWEN, L.J.:

I am of the same opinion. The creditor must be in a position to issue execution at the time when he issues the bankruptcy notice. It is absurd to suppose that under section 4, subsection 1 (g), a bankruptcy notice can be issued in a case in which execution cannot go at all without the leave of the Court, when in a case in which execution might have gone but for the order of the Court staying it, a bankruptcy notice could not be issued. There is a necessary implication that the creditor must not only have obtained

a final judgment, but must also be in a position to issue execution upon it.

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In the case of *In re Woodall, Ex parte Woodall* (see *ante*, Volume I., page 201, L. R. 18 Q. B. D. 479), Lord Justice LINDLEY said, "The words 'execution thereon not having been stayed' show clearly what sort of a creditor is intended. It must be a creditor who is in a position to issue execution on the judgment; it is assumed that execution might have been stayed." With that view of the law I entirely agree.

*Appeal allowed with costs.*

Solicitors: *W. F. Summerhayes*, for Leon W. Ide.  
*W. Morley*, for the petitioning creditor.

Cases relied upon or referred to:—

*In re Woodall, Ex parte Woodall*, see *ante*, Volume I., page 201: L. R. 18 Q. B. D. 479.

*In re Keeling, Ex parte Blanchett*, see *ante*, page 157: L. R. 17 Q. B. D. 303.

*Ex parte Young, In re Young*, L. R. 19 Ch. Div. 124; 51 L. J. Ch. 141; 45 L. T. 498.

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COURT OF  
APPEALBEFORE THE  
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BOWEN, L.J.,  
FRY, L.J.  
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## IN RE HARDWICK, EX PARTE HUBBARD.

*Bill of Sale—Transaction of Pawn or Pledge—Deposit of Goods as Security for Money Lent—Contemporaneous Document recording the Transaction and regulating the Rights of Pledgee as to Sale—Bills of Sale Act, 1878, sections 3 and 4—Bills of Sale Act, 1882, section 9.*

*Held:* (1) That where a transaction is one of pawn or pledge, by which goods are deposited by the pledgor with the pledgee as security for the payment of money then advanced by the pledgee to the pledgor, such transaction is not within the Bills of Sale Acts; and a document signed at the time by the pledgor, recording the transaction and regulating the rights of the pledgee as to the sale of the goods, is not a bill of sale within the meaning of the said Acts.

(2) That the effect of the decision in the case of *In re Townsend, Ex parte Parsons* (see *ante*, page 36 : L. R. 16 Q. B. D. 532) was to determine that an authority to take possession of goods as security for the payment of money is not exempted from the Bills of Sale Acts because it is an authority to take immediate possession: and that a transaction which is contrary to the Bills of Sale Acts is not taken out of the operation of such Acts because from its nature such transaction cannot be expressed in the statutory form of a bill of sale.

THIS was an appeal on behalf of one *Walter Hubbard* from an order of the Divisional Court sitting in Bankruptcy.

The case raised the question whether certain documents executed upon the deposit of goods by way of security for a loan of money by the depositor to the depositor, were "Bills of Sale" within the meaning of the Bills of Sale Acts; and therefore made void by section 9 of the Bills of Sale Act, 1882, because they were not in accordance with the form in the Schedule.

On June 1st, 1886, a motion was made to the Lewes and Eastbourne County Court on behalf of the official receiver acting as trustee in the bankruptcy of *Ernest John Hardwick*, asking the Court to declare that four securities held by the respondent *Walter Hubbard*, and dated respectively, November 14th, 1885, December, 2nd, 1885, January 15th, 1886, and February 7th, 1886, were void; and to order the respondent to deliver up to the official receiver certain tricycles and a bicycle which were comprised or referred to in those securities, and which were in the possession of the said respondent.

From the facts it appeared that on November 14th, 1885, the debtor *Hardwick* borrowed from *Hubbard* the sum of 20*l.*, and



agreed to repay that sum, together with the sum of 5*l.* for interest and expenses, on March 14th, 1886. By way of security for the repayment of those sums the debtor deposited with *Hubbard* two tricycles. On that occasion *Hardwick* signed an agreement as follows:—

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An agreement made the 14th day of November, one thousand eight hundred and eighty-five, between Ernest John Hardwick, of Susan's Road, Eastbourne, in the county of Sussex, agent, of the one part, and Walter Hubbard, of Norfolk House, No. 15, Claremont, Hastings, in the county of Sussex, Gentleman, of the other part, Whereby the said Ernest John Hardwick having this day deposited at his risk with the said Walter Hubbard the goods comprised in the Schedule hereunder written, as security for the payment of the sum of £20 paid by the said Walter Hubbard to the said Ernest John Hardwick this day (the receipt whereof the said Ernest John Hardwick hereby acknowledges) and of the sum of £5 for interest and expenses, Doth hereby agree to pay to the said Walter Hubbard the said sums of £20 and £5 on the 14th day of March, 1886, And it is further agreed that in case of default in payment the said Walter Hubbard after three days' notice in writing delivered at the last known address of the said Ernest John Hardwick may sell the said goods by auction or otherwise, and apply the proceeds of such sale in or towards the payment of any money which may be due under this agreement and of the expenses of sale, but until such default is made no such sale is to take place nor is any action or suit to be brought to enforce payment of the said sum of £20 and interest. And the said Ernest John Hardwick hereby agrees that if the goods be sold and do not realise sufficient to pay the amount then due under this agreement and the costs he will forthwith pay to the said Walter Hubbard whatever sum may remain owing on this agreement with interest thereon until such payment at the rate of Five Pounds per cent. per month. And it is hereby further agreed that if payment shall not be made of the said sums of £20 and £5 on the day hereinbefore appointed the said Ernest John Hardwick hereby agrees to pay interest thereon until payment at the rate of £5 per cent. per month. And the said Ernest John Hardwick hereby agrees to forthwith pay Walter Hubbard such sum or sums as he may pay for the insurance he may effect on the goods comprised in the said schedule with interest thereon at the rate hereinbefore mentioned. As witness the hands of the said parties the day and year first above written.

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THE SCHEDULE ABOVE REFERRED TO.

- 1 Racing Sparkbrook Tricycle, front steerer, net cost, £22 9*s.* 6*d.*
- 1 Ranelagh Club Racer Tricycle, front steerer, net cost, £22 10*s.*

On December 2nd, 1885, the debtor borrowed of *Hubbard* a further sum of £10 1*s.*, and agreed to repay that amount with ten shillings interest on December 16th, 1885, and to pay interest after that day at the rate of 60 per cent. per annum, and by way of security

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for the repayment of those sums and interest the debtor deposited with *Hubbard* a bicycle. On that occasion, and as part of the transaction, the debtor signed a document as follows :—

HASTINGS, *December, 2nd, 1885.*

In consideration of £10 1s. paid me this day by Walter Hubbard, receipt of which I hereby acknowledge, I hereby agree to repay the same together with ten shillings for interest on the 16th December, 1885, and interest thereon after that day at the rate of sixty per cent. per annum, and for securing payment of the aforesaid sums and interest, I deposit a Rudge Bicycle, and hereby empower and authorise you to sell the same in any manner you think proper if the aforesaid sums are not paid on the said 16th December, 1885.

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On January 15th, 1886, the debtor borrowed of *Hubbard* a further sum of £15, and agreed to repay that sum and £3 for interest and expenses on April 15, 1886, and as security for the repayment of those sums the debtor deposited with *Hubbard* two other tricycles. On that occasion, and as part of the transaction, the debtor signed an agreement as follows :—

An agreement made the 15th day of January, one thousand eight hundred and eighty-six, Between Ernest John Hardwick, of Susan's Road, Eastbourne, of the one part, and Walter Hubbard, of Norfolk House, No. 15, Claremont, Hastings, in the County of Sussex, Gentleman, of the other part, Whereby the said Ernest John Hardwick having this day deposited at his own risk with the said Walter Hubbard the goods comprised in the schedule herein-under written as security for the payment of the sum of £15 paid by the said Walter Hubbard to the said Ernest John Hardwick this day (the receipt whereof the said Ernest John Hardwick hereby acknowledges) and of the sum of £3 for interest and expenses : Doth hereby agree to pay to the said Walter Hubbard the said sums of £15 and £3 on the 15th day of April, 1886. And it is further agreed that in case default is made in payment of the said £15 and £3 making together £18 and interest, the said Walter Hubbard, after three days' notice in writing delivered at the last known address of the said Ernest John Hardwick, may sell the said goods by auction or otherwise and apply the proceeds of sale in or towards the payment of any money which may be due under this agreement and of the expenses of sale, but until such default is made no such sale is to take place, nor is any action or suit to be brought to enforce the payment of the said sum of £18 and interest. And the said Ernest John Hardwick hereby agrees that if the goods be sold and do not realise sufficient to pay the amount then due under this agreement and the costs he will forthwith pay to the said Walter Hubbard whatever sum may remain owing on the agreement with interest thereon until payment at the rate of £60 per centum per annum. And it is hereby further agreed that if payment shall not be made of the said instalments respectively or any of them on the days hereinbefore appointed the whole of the balance due under this agreement shall become payable forthwith, and Ernest John Hardwick in such

case hereby agrees to pay such balance forthwith with interest thereon until payment at the rate of £60 per centum per annum. And the said Ernest John Hardwick hereby agrees to forthwith pay the said Walter Hubbard such sum or sums as he may pay for the insurance he may effect on the goods comprised in the schedule with interest thereon at the rate hereinbefore mentioned. As witness the hands of the said parties the day and year first above written.

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THE SCHEDULE.

- 1 Singer's Patent Telescopic Tricycle.
- 1 Imperial Club Front Steerer Tricycle.

On February 7th, 1886, the debtor borrowed of *Hubbard* a further sum of £13 10s. payable on April 6th, 1886, and by way of security for repayment of that amount the debtor deposited with *Hubbard* another tricycle. On that occasion, and as part of the transaction, the debtor signed a document as follows :—

NORFOLK HOUSE, 15, CLAREMONT,

Hastings, *February 7th, 1886.*

I deposit with W. Hubbard a tricycle to secure £13 10s., to be paid on the 6th April, 1886, and if not paid you have this authority to sell it in the manner you like best.

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*Hardwick* subsequently became bankrupt, and the official receiver as trustee in the bankruptcy thereupon claimed the goods which had been deposited, on the grounds that the terms of the several agreements between the debtor and *Hubbard* having been reduced into writing, the four documents were the sole evidence of the agreements between the parties: that the four documents were bills of sale within sections 3 and 4 of the Bills of Sale Act, 1878: and that being given by way of security for the payment of money by the grantor, and not being in the form prescribed by the Bills of Sale Act, 1882, they were void under section 9 of that Act.

On behalf of *Hubbard* it was contended (1) that he acquired possession of the goods in question by actual delivery, and that the transaction in each case was a pledge of personal chattels and not a mortgage: and (2) that the documents were nothing more than powers or authorities to sell, as the property or the chattels did not pass by the instrument, but by an independent delivery.

The learned County Court judge declared the documents void as being bills of sale, stating as his sole reason for doing so, that in

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consequence of the language used by the Court of Appeal in the case of *In re Townsend, Ex parte Parsons* (see *ante*, p. 36 ; L. R. 16 Q. B. D. 532) he felt bound to hold that section 9 applied to all documents which give a security upon goods for the payment of money,

The Divisional Court in Bankruptcy, after much consideration, affirmed this decision upon solely the same ground.

*Hubbard* now appealed to the Court of Appeal.

*Cock*, Q.C. (*Scott* and *Duke* with him), for the appellant *Hardwick*.

These documents were not bills of sale. All the judges, both the judge of the County Court and those of the Divisional Court, were of opinion that they were not so, but they felt bound to give the decision they did by reason of the language used in *In re Townsend, Ex parte Parsons* (see *ante*, p. 36 ; L. R. 16 Q. B. D. 532). The transaction hands over the chattels then and there as an ordinary 'pledge. It is precisely the same transaction as a pledge. It was never intended that the Bills of Sale Acts should apply to such a case as this. A pledge gives the pledgee a right to retain the possession which is actually given to him by the pledgor or grantor, but it does not in the proper sense of those words give him the power to "seize or take possession of" the chattels pledged. The expression "bill of sale" is defined by section 4 of the Act of 1878, and reading sections 3 and 4 together it is shown that the Acts apply to cases where there is a right under the instrument to seize or take possession of chattels in the possession of the grantor, but that they do not apply to cases where the grantee obtains the possession by actual delivery of the chattels. The case of *In re Hall, Ex parte Close* (L. R. 14 Q. B. D. 386 ; 54 L. J. Q. B. 43 ; 51 L. T. 795) supports the view that pledges are outside the Acts. In that case it was held that, "Whatever documents are included in the expression 'bill of sale' as defined by the Bills of Sale Acts, they must still, by force of section 3 of the Bills of Sale Act, 1878, be limited to documents 'whereby the holder or grantee has power to seize or take possession of any personal chattels comprised in or made subject to such' document. The Acts, therefore, do not include letters of hypothecation accom-

panying a deposit of goods or pawn tickets given by a pawnbroker, or in fact any case where the object and effect of the transaction are immediately to transfer the possession of the chattels from the grantor to the grantee." The same view was taken in the case of *In re Cunningham & Co.* (L. R. 28 Ch. Div. 682; 54 L. J. Ch. 448; 52 L. T. 214). But in the recent case of *In re Townsend, Ex parte Parsons* (see *ante*, p. 36; L. R. 16 Q. B. D. 582) the Master of the Rolls said, "It seems to me that the words of section 9 strike at all documents which give a security upon goods for the payment of money, and I take it the legislature intended to say, if you cannot make your agreement by a document in the form specified in the schedule you shall not be able to make it by any document at all. I cannot, therefore, agree with the *ratio decidendi* of either of the two cases which have been relied upon. But I think that *Ex parte Close* was obviously rightly decided, because the document there in question was one of those which are excepted by the proviso at the end of section 4 of the Act of 1878, and for that reason it was not within the Act. In *In re Cunningham & Co.*, Pearson, J., did not follow the actual decision in *Ex parte Close*, but he applied the doctrine, which was not necessary to the decision of that case, and I think he intended to agree with that doctrine. If his decision required the application of that doctrine I cannot agree with the decision; if it had not, still I cannot agree with the doctrine." And Lord Justice LINDLEY said, "Section 9 of the Act of 1882 avoids every document by which goods are made a security for a debt, unless it is made in accordance with the prescribed form, if it is not one of the excepted classes of documents, and I think the true construction of section 9 is that, if the transaction is not expressed in the statutory form and does not fall within the exceptions, it is void." Both the County Court judge and those of the Divisional Court were influenced by the language used in this case.

[THE MASTER OF THE ROLLS.—That was because the judges would force the language used by me and by my brother LINDLEY much wider than it was ever intended.]

*Sir Horace Davey* (*Muir Mackenzie* with him): for the official receiver :

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I will not now attempt to support this case on the language used in *In re Townsend, Ex parte Parsons* (see *ante*, page 36 : L. R. 16 Q. B. D. 532). The Court of Appeal is fully competent to interpret their own judgments, and I am prepared to accept their interpretation. But it is obvious from the Bills of Sale Act, 1882, that the policy of the Act of 1882 was different from that of the earlier Acts. The object of the Act of 1882 is to secure unwary borrowers from unscrupulous money-lenders. That was the object of the legislature. These documents are bills of sale within the meaning of section 4 of the Bills of Sale Act, 1878. That section provides that "The expression 'Bill of Sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase-moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licenses to take possession of personal chattels as security for any debt, and also any agreement whether intended or not to be followed by the execution of any other instrument by which a right in equity to any personal chattels, or to any charge or security thereon shall be conferred." The documents are transfers. Lenders of money have always tried to avoid the Act, and therefore we look at these documents with some suspicion. I notice that these documents are said to be executed when the goods were handed over, and give a power of sale. A pledgee has at law a right to sell (*Pigot v. Cubley*, 15 C. B. N. S. 701). If the transaction was a pledge which had a power of sale belonging to it naturally why were these documents necessary. I say that these goods were only given into possession, and the money handed over after the documents were signed. Possession was only taken in pursuance of the agreement. It was a license to take immediate possession on the execution of the document.

#### THE MASTER OF THE ROLLS (LORD ESHER):

Judgment.

In this case the only difficulty in the Divisional Court was the interpretation the learned judges there put on language used in this Court in the case of *In re Townsend, Ex parte Parsons*, (see *ante*, page 36 : L. R. 16 Q. B. D. 532). With great deference to those learned judges, I must say, that if they had examined the judgments

in that case, they would have seen they were attributing that to us which we never intended to say. They could not come to the conclusion that the Court of Appeal decided in that case what they supposed they had decided, without also coming to the conclusion that the Court of Appeal also intended to reverse half-a-dozen other recent decisions which we have given. All that was in my mind in the case with regard to *In re Hall, Ex parte Close* (L. R. 14 Q. B. D. 386; 54 L. J. Q. B. 43; 51 L. T. 795) and *Ex parte Cunningham & Co.* (L. R. 28 Ch. Div. 682; 54 L. J. Ch. 448; 52 L. T. 214), was to express disapproval of the supposed *ratio decidendi* of those two cases—viz., that if, from the nature of a transaction, such transaction cannot possibly be expressed in the statutory form of a bill of sale, the Bills of Sale Acts do not apply to it at all. In giving judgment I said “\* \* \* Then this difficulty arises, that two learned judges, for whose opinion we have the greatest respect, have in substance held this—that, when there is such an ordinary transaction as an advance of money upon the security of goods, the arrangement being that possession of the goods is to be given to the lender immediately, you cannot by any possibility express the transaction in the statutory form, and therefore the legislature could not have intended to deal with such a transaction at all. The true conclusion must therefore be, that section 9 does not apply to a document by which the right to take immediate possession of goods is given.” That is the supposed *ratio decidendi* of which I ventured to disapprove. Mr. Cooper Willis in his argument in that case had said, “A document which gives a right to immediate possession of goods is not a bill of sale within the Acts,” and in support of that he cited *Ex parte Close*. He also argued, “It is impossible from its nature that such a document can be made in the statutory form, therefore it cannot be within the Acts,” and for that he cited *Ex parte Cunningham & Co.* Lord Justice LINDLEY in his judgment said, “It appears to me that the reasoning of the judges in the two cases which have been cited—that, because you cannot express a transaction in the form given in the schedule to the Act of 1882, therefore the Act does not apply to it—is erroneous.” If in the present case, therefore, the judges had carefully examined what we really did say in the case of *Ex parte Parsons*, they would not have come to the conclu-

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sion which they did. Clearly the ground on which the judgment was given by the Divisional Court cannot be maintained. But we must go further and see if the Divisional Court were right in saying that, apart from the case of *Ex parte Parsons*, they would have decided the other way. These documents are manifestly not what are known as regular bills of sale. Are they within the Act of 1882? They can only be bills of sale within the Act of 1882 if they come within the definition of section 4 of the Act of 1878. It is said that these documents are transfers. But the word transfer in section 4 means a document which, though not in the form of a bill of sale, assumes to transfer the property in goods as a bill of sale would. It is impossible to say that the documents here assume to transfer the property. They certainly look more like authorities to deal with chattels as security for a debt. But the words of the section are "authorities or licenses to take possession of personal chattels as security for any debt." If the documents conferred on the grantee the right to take possession of the chattels, even though it was a right to take immediate possession, the case of *Ex parte Parsons* is a decision that they would be within the section. Therefore, it comes to this, are these documents authorities to take possession? A right to take possession, means a right to take possession whether the grantor likes it or not. Where the transaction depends, not on the power of the grantee to take possession, but the grantor is to give and the grantee is to receive possession, and the transaction is not to begin until the grantor voluntarily gives possession of the goods to the grantee, it is not an authority to take possession. What I have stated, although not likely to pass without criticism and certainly not without hypercriticism, will exclude transaction of pledge. What is a pledge? It is this, "I will lend you money if and when you deposit goods with me. I will not lend you money until you give the things into my possession." Therefore, was this transaction in reality a pledge, and can we find that from the expression in these documents? In my opinion the expressions in the documents describe a pledge, and almost in the simplest terms. They no doubt regulated the rights of the grantee who had got possession of the goods, but they gave him no authority to take possession. The transaction being really one of pledge and nothing else, the documents which describe the transac-



tion are not bills of sale either in the ordinary sense, or within the meaning of section 4, and are not therefore within the Act of 1882. I am of opinion, therefore, that the decision of the Divisional Court was wrong, and that the judges only came to a wrong decision by hypercritically dealing with the language in the case cited. The appeal must be allowed with costs.

1886.  
IN RE  
HARDWICK,  
EX PARTE  
HUNNARD.

BOWEN, L.J. :

I am of the same opinion. The question is whether these documents are bills of sale? Now what were these transactions and what are the documents? There is at Common Law the mortgage of personal chattels, and there is also the transaction of pledge, in which case there must be a delivery of possession. The general property remains in the pledgor; a special property goes to the pledgee for his security. In all cases of pledge there is a power in the pledgee to sell on default, with notice. If a pledge is accompanied by a document it is expected that the document must regulate the terms on which the property is to be held. That is what these documents do. Is such a document within the Bills of Sale Acts? I am of opinion that such a document is not within the Act and was not struck at by the Act. Our decision to-day rehabilitates the case of *In re Hall, Ex parte Close* (L. R. 14 Q. B. D. 386; 54 L. J. Q. B. 43; 51 L. T. 795), if ever a shadow was put upon it. The case of *In re Townsend, Ex parte Parsons*, (see *ante*, page 36; L. R. 16 Q. B. D. 532) does not decide that the Bills of Sale Act, 1882, applies to documents regulating the rights of pledgor and pledgee; or that documents fall within the Act which are not either popularly bills of sale or come within the definitions. But it does decide that it is no argument in defending a document to say that it could not be brought within the form given in the schedule, and therefore it was not necessary to do so.

FRY, L.J. :

I am of the same opinion. The first inquiry is what is the true nature of the transaction here. The documents to my mind truly express the transaction. It is a simple case of pawn or pledge and nothing more. Now is a simple pawn or pledge within the Bills of Sale Acts? It was not contended so and it could not be so. This

1886.  
IN RE  
HARDWICK,  
EX PARTE  
HUBBARD.

transaction being one of pawn or pledge is not within the Act. The transaction was not a "transfer." The general property remained with the borrower; only a special property went to the lender. It was not an "authority to take possession." Possession was given, which is essential to every pawn or pledge. Possession preceded and did not follow the execution of the instruments. Neither was it a "right in equity." No right in equity was conferred by these documents; they regulated the exercise of a legal right. The case of *In re Townsend, Ex parte Parsons* (see ante, page 86; L. R. 16 Q. B. D. 532), is not in any way contrary to this decision. The appeal must therefore be allowed with costs.

*Appeal allowed with costs.*

Solicitors: *J. S. Hepworth*, for Mr. Hubbard.

*The Solicitor to the Board of Trade*, for the Official Receiver.

Cases relied upon or referred to :

*In re Townsend, Ex parte Parsons*, see ante, page 86; L. R. 16 Q. B. D. 532.

*In re Hall, Ex parte Close*, L. R. 14 Q. B. D. 386; 54 L. J. Q. B. 48; 51 L. T. 795.

*In re Cunningham & Co.*, L. R. 28 Ch. Div. 682; 54 L. J. Ch. 448; 52 L. T. 214.

*Pigot v. Cubley*, 15 C. B. N. S. 701.

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## IN RE DASHWOOD, EX PARTE KIRK.

*Discovery of Documents—Friendly Creditor—Abuse of process of the Court.*

*Held:* That the Court will not allow its process to be used to do indirectly that which the process of the Court will not allow to be done directly.

Thus where application was made by a friendly creditor for discovery of documents, nominally for the purpose of carrying out proceedings to expunge a proof, but in reality or the purpose of reopening, after time for appeal had elapsed, the question as to whether the receiving order had been properly made against the bankrupt or not.

*Held:* That the application was an attempt by the contrivance of the creditor and the bankrupt, in the interest of the bankrupt, to use the process of the Court to do that which, if the bankrupt himself asked the Court, the Court would not allow to be done: and that the registrar was quite right in refusing it.

COURT OF  
APPEAL.  
BEFORE THE  
MASTER OF  
THE ROLLS,  
BOWEN, L.J.,  
FRY, L.J.  
1886.

August 6th.

THIS was an appeal on behalf of one *Kirk*, a creditor in the bankruptcy of *H. M. Dashwood*, from a decision of Mr. Registrar Giffard refusing to make an order for discovery of documents.

The proceeding in which discovery was sought was a notice of motion to expunge a proof of debt for the sum of 1500*l.* lodged by Messrs. *Berlandina Bros.*, who were also creditors in the said bankruptcy.

The bankrupt, *H. M. Dashwood*, was a solicitor, and Messrs. *Berlandina Bros.* are brokers.

During the years 1882 and 1883 the bankrupt entered into certain speculations through Messrs. *Berlandina Bros.* in petroleum and resin spirit, in the course of which he paid to them some 8000*l.* or 4000*l.*, but in 1884 he owed them a further sum of 1400*l.*, for which he then gave them a cheque.

This cheque was not met, however, and *Dashwood* left the country.

A petition in bankruptcy was thereupon presented against him by Messrs. *Berlandina Bros.*, upon which a receiving order was made in 1884.

In the year 1885 *Dashwood* returned to England, and application was then made by him to discharge the receiving order, upon

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DASHWOOD,  
EX PARTE  
KIRK.

which he obtained an order against Messrs. *Berlandina Bros.* for discovery of documents, but the application in question was not heard, being out of time, and an appeal to the Court of Appeal by *Dashwood* was also dismissed for the same reason.

Subsequently to this *Kirk*, the present appellant, lodged a proof in the bankruptcy for 38*l.*, for which he was admitted a creditor on January 20th, 1886.

*Kirk* thereupon moved to expunge the debt of Messrs. *Berlandina Bros.* under Rule 25 of Schedule 2 of the Bankruptcy Act, 1883, which provides that, "The Court may also expunge or reduce a proof upon the application of a creditor if the trustee declines to interfere in the matter, or, in the case of a composition or scheme, upon the application of the debtor."

He also sought for discovery of documents. This latter application having been refused by the registrar, *Kirk* now appealed to the Court of Appeal.

*Herbert Reed* : for the creditor *Kirk*.

When Messrs. *Berlandina Bros.* presented their petition they alleged that the money was due from the bankrupt for differences, and they produced some books, but they were not gone into. The receiving order was made in 1884. In 1885, when *Dashwood* applied to discharge this receiving order and obtained an order for discovery, Messrs. *Berlandina Bros.* at once moved to prevent the motion to discharge from being heard as being out of time, and in that they were successful. Mr. *Kirk* and Messrs. *Berlandina Bros.* are the only creditors. *Kirk's* proof was admitted on January 20th, 1886, and he has moved to expunge *Berlandina's* debt. That motion is not yet heard, but the registrar has refused an order for discovery of documents to Mr. *Kirk*, which is certainly necessary to him.

[THE MASTER OF THE ROLLS.—I should like to know who your real client is? *Kirk* is a friend of *Dashwood*.]

Messrs. *Berlandina Bros.* have never produced their books. The reason the registrar gave for refusing the order for discovery was, that in his opinion Mr. *Kirk* applied for *Dashwood's* benefit.

But a creditor has a right to move to expunge a proof, and discovery was necessary to him.

1886.  
~  
IN RE  
DASHWOOD,  
EX PARTE  
KIRK.

[FRY, L.J.—Are there any assets?]

There are none at present, but *Dashwood* may continue his business and may make money.

*Sidney Woolf*: for Messrs. Berlandina Brothers, was not called upon.

THE MASTER OF THE ROLLS (LORD ESHER):

There is a rule, and it is a very wholesome rule, that the Court Judgment will not allow its process to be used to do indirectly that which the process of the Court will not allow to be done directly. This is really an attempt to see whether this receiving order ought to have been made against *Dashwood* when it is too late to consider that question. He was too late in his motion before the registrar to set aside the receiving order which had been made. He was too late in the Court of Appeal. And so a friendly creditor, *Kirk*, is prevailed upon to allow his name to be used, not that *Kirk* may get his 89*l.*, but that *Dashwood* may re-open the question whether he was properly made a bankrupt or not. It is an attempt by the contrivance of *Kirk* and *Dashwood*, in the interest of *Dashwood*, to use the process of the Court to do that which if *Dashwood* himself asked the Court, the Court would not allow to be done. It is in my opinion a trick and a contrivance, and the registrar was quite right in his decision. The appeal must be dismissed with costs.

BOWEN, L.J., and FRY, L.J., concurred.

*Appeal dismissed with costs.*

Solicitors: *Gardiner & Leader*, for Mr. *Kirk*.

*Hollams, Son & Coward*, for Messrs. Berlandina.

## PRACTICE.

COURT OF  
APPEAL.

BEFORE THE  
MASTER OF  
THE ROLLS,  
BOWEN, L.J.,  
FRY, L.J.,  
1886.

August 10th  
and 11th.

IN RE SADLER, EX PARTE NORRIS.

*Bankruptcy Act, 1883, Schedule II., Rule 13.*

*Secured Creditor—Amendment of Valuation of Security—"At any time."*

*Held:* (1) That where a valuation was put upon a security by a creditor which, owing to the death of the bankrupt, greatly increased in value, such creditor was entitled to amend his valuation under Rule 13 of Schedule II. of the Bankruptcy Act, 1883, notwithstanding that the trustee in the bankruptcy had stated to the creditor that he intended to purchase the security at his valuation, but the purchase-money had not been paid.

(2) That the words of the said Rule 13, which provides that a secured creditor may amend the valuation of his security made in his proof of debt "at any time," are to be limited to the extent that the right cannot be exercised after the trustee in the bankruptcy has actually paid for the security at the valuation set upon it by the creditor.

A further limitation may also arise if, under Rule 12 (c) of Schedule II., the creditor, by notice in writing, puts the trustee to his election whether he will redeem the security or not, and the trustee has declared his election to purchase the security at the creditor's valuation.

THIS was an appeal by one *Norris*, a creditor in the bankruptcy of *R. D. Sadler*, from a decision of Mr. Justice CAVE refusing to allow an amendment of valuation of security contained in a proof.

The case raised an important question as to the extent of the right of a secured creditor to amend the valuation of his security contained in his proof of debt on a subsequent alteration in the value of the security.

In the year 1885 *R. D. Sadler* became bankrupt, and on December 12th, 1885, the creditor *Norris* delivered to the trustee in the bankruptcy a proof of debt for 327*l.* 9*s.* 7*d.*, stating in his affidavit that he held as security for the debt a policy of insurance for the sum of 200*l.* on the life of the bankrupt, which policy he estimated at its surrender value of 21*l.* 7*s.* 9*d.*

There was no formal admittance of the proof by the trustee under Rule 22 of Schedule II. of the Bankruptcy Act, 1883, but on

December 14th, 1885, the trustee wrote to the solicitors of *Norris* stating that he intended to redeem the policy at its estimated value, and on December 19th he applied to the Board of Trade for a cheque for 21*l.* 7*s.* 9*d.* for that purpose, which was duly sent to him on December 23rd.

1886.  
IN RE  
SADLER,  
EX PARTE  
NORRIS.

But on the same day—December 23rd—the bankrupt died.

By this death of the bankrupt the policy in question greatly increased in value, and on December 31st, 1885 the solicitors of *Norris* wrote to the trustee to withdraw the proof, which had not been dealt with in any way.

The trustee, however, refused this or to allow the creditor to amend his valuation, and application to the Court for this purpose was also refused on the ground that it was too late to do so after the trustee had given notice of his intention to redeem the policy at the amount placed upon it by the creditor in his valuation.

From that decision the creditor *Norris* now appealed to the Court of Appeal.

Schedule I. of the Bankruptcy Act, 1883, which is headed "Meetings of Creditors," provides by Rule 10 "For the purpose of voting, a secured creditor shall, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to vote only in respect of the balance (if any) due to him, after deducting the value of his security. If he votes in respect of his whole debt he shall be deemed to have surrendered his security unless the Court, on application, is satisfied that the omission to value the security has arisen from inadvertence. (12.) It shall be competent to the trustee, or to the official receiver, within twenty-eight days after a proof estimating the value of a security as aforesaid has been made use of in voting at any meeting, to require the creditor to give up the security for the benefit of the creditors generally on payment of the value so estimated, with an addition thereto of twenty per centum. Provided, that where a creditor, has put a value on such security, he may, at any time, before he has been required to give up such

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SADLER,  
EX PARTE  
NORRIS.

security as aforesaid, correct such valuation by a new proof and deduct such new value from his debt, but in that case such addition of twenty per centum shall not be made if the trustee requires the security to be given up."

Schedule II. is headed "Proof of Debts," and Rules 9 to 17 deal with proofs by secured creditors.

By Rule 11, "If a secured creditor does not either realise or surrender his security, he shall, before ranking for dividend, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed."

"12 (a). Where a security is so valued the trustee may at any time redeem it on payment to the creditor of the assessed value. (c.) Provided that the creditor may, at any time, by notice in writing, require the trustee to elect whether he will or will not exercise his power of redeeming the security or requiring it to be realised, and if the trustee does not, within six months after receiving the notice, signify in writing to the creditor his election to exercise the power, he shall not be entitled to exercise it, and the equity of redemption, or any other interest in the property comprised in the security which is vested in the trustee, shall vest in the creditor, and the amount of his debt shall be reduced by the amount at which the security has been valued."

"13. Where a creditor has so valued his security he may at any time amend the valuation and proof on showing to the satisfaction of the trustee, or the Court, that the valuation and proof were made *bonâ fide* on a mistaken estimate, or that the security has diminished or increased in value since its previous valuation; but every such amendment shall be made at the cost of the creditor, and upon such terms as the Court shall order, unless the trustee shall allow the amendment without application to the Court."

*Sidney Woolf*: for Mr. Norris.

Mr. *Norris* never voted or received any dividend in respect of the proof. It was not until January 1st, 1886, that the trustee indorsed



the proof as admitted, and then no notice of this was given to the creditor. On December 31st, 1885, the letter had been written withdrawing the proof, and up to that time it had not been dealt with. Rule 22 of Schedule II. provides that "The trustee shall examine every proof, and the grounds of the debt, and in writing admit or reject it, in whole or in part, or require further evidence in support of it. If he rejects a proof he shall state in writing to the creditor the grounds of the rejection." Until a proof has been admitted, there is the right of a creditor to withdraw. Then Rules 9 to 17 of the same Schedule deal with proof by secured creditors, and by Rule 13, "Where a creditor has so valued his security, he may at any time amend the valuation and proof on showing to the satisfaction of the trustee, or the Court, that the valuation and proof were made *bonâ fide* on a mistaken estimate, or that the security has diminished or increased in value since its previous valuation." The creditor here asked to amend on the ground that the security had increased in value. It must be remembered that the trustee had not paid the 2*l.* 7*s.* 9*d.* His right to redeem a security which has been valued is given by Rule 12 (a) of the second Schedule, and by that rule such redemption is only on payment to the creditor of the assessed value. The Court below said that some limit must be put on the words "at any time" in Rule 13, and that after the trustee had given notice of his intention to redeem amendment could not be allowed. I submit that under Rule 13 Mr. Norris is entitled to amend his valuation on the ground that the security has increased in value; or at any rate under Rule 15 that the net amount realised may be substituted for the amount of the valuation previously made by him.

1886.  
IN RE  
SADLER,  
EX PARTE  
NORRIS.

*Pyke* : for the trustee in the bankruptcy.

The simple point in the Court below was whether, after notice to redeem had been given by the trustee, on an increase in the value of the security the creditor had a right to amend the proof. The notice to redeem was equivalent to an acceptance of the offer of the creditor. When a creditor assesses the value of his security, it is tantamount to an offer on his part which, if accepted by the trustee, is binding. There must be some limitation under Rule 13.

1886.

IN RE  
SADLER,  
EX PARTE  
NORRIS.  
Judgment.

August 11th.

THE MASTER OF THE ROLLS (LORD ESHER) :

In this bankruptcy a creditor named *Norris*, on December 12th, 1885, proved in respect of a debt for 327*l.* 9*s.* 7*d.*, and having a policy of insurance on the life of the debtor he valued the policy at 21*l.* 7*s.* 9*d.* The trustee in the bankruptcy did not formally admit the proof, but on December 14th he gave notice to the creditor that he desired to redeem the policy at 21*l.* 7*s.* 9*d.*, and on December 23rd he obtained from the Board of Trade a cheque for 21*l.* 7*s.* 9*d.*, which he intended to pay over to the creditor for that purpose. But on that day the bankrupt died. It is obvious that the death of the bankrupt increased materially the value of the policy, and thereupon the creditor gave notice that he desired to amend his valuation. The trustee insisted that he was too late. The creditor insisted that he was in time. The question does not depend on any contract between them, but on the Act of Parliament and on the rules. Really the only rule to be considered is Rule 13 of Schedule II. The question depends on the construction of that rule. The creditor wishes to act under that rule. The question is, Is the creditor too late to do so? The rule says that where a creditor has valued his security he may "at any time amend the valuation and proof on showing to the satisfaction of the trustee, or the Court, that the value and proof were made *bonâ fide* on a mistaken estimate, or that the security has diminished or increased in value since its previous valuation." It is not pretended that there was a mistake here, but the creditor has shown to the satisfaction of the Court that the security has "increased in value since its previous valuation." That being so, if the words of the rule are taken in their ordinary sense he may amend his valuation "at any time." We have no right to diminish the force of those words, unless from the Act itself or the rules we can find some necessary implication which will limit it. Clearly it was intended there should be a limit. The right cannot go on for ever. One limitation is undoubtedly where redemption has taken place;—where the trustee has actually exercised the right given to him by Rule 12 of redeeming the security at the assessed value. After the trustee has actually paid the creditor the amount of his valua-

tion, and has become the purchaser of the security for the other creditors, it is a necessary implication that amendment cannot be made. The creditor cannot then be allowed to undo all that has been done by re-valuing the security. Now, is there any other implication? There might be another limitation if, under Rule 12 (c) of the second Schedule, the creditor had, by notice in writing, put the trustee to his election whether he would redeem the security or not. If there is such limitation, however, it does not apply to the present case. No notice was given by the creditor. The only limitation which could be applicable to this case is, that after the trustee has actually paid the money the creditor cannot re-open the transaction. Here, although the trustee was willing to pay the 21*l.* 7*s.* 9*d.*, he had not in fact done so. I am of opinion, therefore, that nothing had arisen to limit the right of the creditor under Rule 13, and the appeal must be allowed.

1886.  
IN RE  
SADLER,  
EX PARTE  
NORRIS.

FRY, L.J. :

Rule 12 of the second Schedule provides, that where a creditor has valued his security "he may at any time amend the valuation and proof on showing to the satisfaction of the trustee, or the Court, that the valuation and proof were made *bonâ fide* on a mistaken estimate, or that the security has diminished or increased in value since its previous valuation." In the present case the value of the security has increased by the death of the bankrupt. The question is, Has the creditor here lost his right to amend? On December 14th, the trustee wrote, saying that he would redeem the policy. But he did not actually redeem the policy, neither did he make any election under Rule 12 (c). In my opinion nothing has happened which prevents the creditor from exercising his right to amend his valuation. Schedules I. and II. to the Bankruptcy Act, 1888, are not inconsistent. Schedule I. applies to valuation for voting purposes.

BOWEN, L.J. :

Rule 12 of Schedule II. must be construed as quite distinct from Rule 12 of Schedule I. The subject-matter with which the two schedules deal is entirely different. The two schedules derive their validity from entirely different sections of the Act. The words of

1886.  
IN RE  
SADLER,  
EX PARTE  
NORRIS.

Rule 13 of Schedule II. *primâ facie* give an unlimited power of amendment. It is said here that the letter of December 14th has deprived the creditor of the right of amendment. But Rule 12 (a) says that where a security is valued the trustee may at any time redeem it "on payment to the creditor of the assessed value." There is nothing said as to the creditor being deprived of his right by anything which falls short of payment. The trustee cannot deprive the creditor of the right given to him by Rule 13 by anything short of actual payment of the assessed value of the security, and he is not put to his election unless a notice in writing under Rule 12 has been given by the creditor. Doubtless a person who has an unlimited right given to him by statute may so act as to make it inequitable that he should exercise it. But in the present case nothing has happened between the parties which estops or prevents the creditor from exercising his option to amend. This appeal must, therefore, be allowed, the costs below to be borne by the creditor, the costs of the appeal to be borne by the trustee.

*Appeal allowed with costs accordingly.*

Solicitors : *Hollams, Son & Coward*, for Mr. Norris.

*Irvine & Hodges*, for the trustee in the bankruptcy.

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## IN RE PALMER, EX PARTE PALMER.

*Annulment of Bankruptcy—Application by Bankrupt for Delivery of Books and Account—Pending Criminal Proceedings against Trustee—Adjournment.*

COURT OF  
APPEAL.

BEFORE THE  
MASTER OF  
THE ROLLS,  
LINDLEY, L.J.,  
LOPES, L.J.  
1886.

October 29th.

Where after the annulment of bankruptcy proceedings, application was made by the bankrupt for an order against the trustee to deliver up books and papers and a statement of account, the said trustee, with the solicitors and committee of inspection, having been indicted by the bankrupt for conspiracy in bringing about the bankruptcy with intent to defraud, which indictment was then pending.

*Held*: That in the face of the criminal proceedings the application could not then be allowed; and that the proper course under the circumstances was to order the case to stand over until after the trial upon the indictment had taken place, or until its abandonment.

THIS was an appeal on behalf of the debtor *Palmer* from a decision of Mr. Registrar Hazlitt refusing to order the trustee in the bankruptcy to deliver up to the bankrupt certain books and papers and a statement of account.

By the facts stated it was alleged that the debtor *Palmer* came from Australia to this country some years ago, and was then possessed of a reversionary interest of considerable value. He fell into the hands of certain money-lenders, and in the year 1881 was adjudicated bankrupt.

After the bankruptcy the debtor went back to Australia, but returned to England in the year 1885, when, upon information that the bankruptcy proceedings had been improperly used against him, he took steps to obtain redress.

In November, 1885, the order of bankruptcy was annulled, and thereupon any surplus from the estate reverted under the statute in the bankrupt.

The trustee in the bankruptcy, together with the committee of inspection and the solicitors, were also indicted by *Palmer* in respect of the circumstances under which he had been made bankrupt, the said indictment being now pending.

The trustee having refused and the learned registrar having under the circumstances declined to make an order directing such

1886.  
IN RE  
PALMER,  
EX PARTE  
PALMER.

trustee to deliver up to the bankrupt his books and papers, with an account and statement of costs, *Palmer* now appealed to the Court of Appeal.

*Herbert Reed*: for the debtor *Palmer*.

The debtor alleges that the whole object of the bankruptcy proceedings was for the purpose of getting possession of the reversionary interest. Certain property in Australia was sold by the trustee to a member of the committee of inspection, and it fetched 800*l*. That sum the debtor alleges was not paid into the bank by the trustee, but more than a year afterwards a dividend of 20*s*. in the pound was paid on all the unsecured debts. So far as he can ascertain the amount thus expended was 168*l*. Also 240*l*. was paid as the amount of debts charged on the reversion. The trustee retained 151*l*. for remuneration, and 118*l*. went to the solicitors for costs. That is the debtor's story, showing out of 800*l*. the sum of 408*l*. paid to creditors, and the rest going in expenses, except 66*l*. paid to the Bankruptcy Estates Account. When *Palmer* was informed on his return from Australia in 1885 that he had been imposed upon, he at once took steps to punish those whom he alleges have defrauded him. The bankruptcy having been annulled he is entitled to any surplus there may be. It is necessary to have the books and papers and an account in order to ascertain the surplus. The trustee was at first willing to hand them over, but criminal proceedings having been taken, he refused to do so.

[THE MASTER OF THE ROLLS.—You have indicted the trustee, the solicitors, and the committee of inspection, and now ask to see the books. While an indictment is hanging over the trustee's head you ask him to furnish the books. At first sight that looks very much as if you wanted to see the books for the purpose of the indictment.]

If the trustee has been honest he has nothing to fear. The indictment is for conspiracy in bringing about the bankruptcy with intent to defraud.

[THE MASTER OF THE ROLLS.—The effect—and it may be the

object—of the application is to get evidence on the indictment. If there was only the question of the bankruptcy to be considered, the debtor might perhaps be entitled to what he wants, but, let it be understood, I do not intend definitely to express any opinion on that point now. Having indicted the trustee and his solicitors for conspiracy, however, he has raised a difficulty against himself.]

1886.  
IN RE  
PALMER,  
EX PARTE  
PALMER.

*H. Kisch* : for the trustee, entered into certain explanations with regard to the criminal proceedings.

THE MASTER OF THE ROLLS (LORD ESHER) :

In this case a great many things have been said which were quite Judgment. unnecessary to be said in respect of the criminal proceedings that have been taken. It seems to me to be one of those cases which with regard to the honesty of everybody concerned in it will have to be enquired into. This Court is certainly not now in a position to accept the assertions of either side. We shall, therefore, adjourn this appeal until after the trial upon the indictment has taken place, or until its abandonment.

LINDLEY, L.J., and LOPES, L.J. concurred.

*Appeal adjourned accordingly.*

Solicitors : *Raphael*, for the debtor Palmer.

*Rosenthal*, for the trustee.

## PRACTICE.

COURT OF  
APPEAL.BEFORE THE  
MASTER OF  
THE ROLLS,  
LINDLEY, L.J.,  
LOPES, L.J.,  
1886.

Nov. 12th.

IN RE PAYNE, EX PARTE CASTLE MAIL PACKET  
COMPANY.*Bankruptcy Act, 1883, section 28 and section 104 (2).**Discharge—Discretion of Registrar—Appeal by Creditor—Locus standi—"Person aggrieved"—Costs against Undischarged Bankrupt.*

*Held:* (1) That an unpaid creditor is a "person aggrieved" within the meaning of section 104, sub-section (2), of the Bankruptcy Act, 1883, by the granting of an order of discharge to a bankrupt, and as such has a right of appeal against such order.

(2) That where the registrar is not required by the provisions of the Bankruptcy Act absolutely to refuse a bankrupt's discharge, he has a discretion under section 28 as to the amount of punishment to be inflicted, and it will require a very strong case to induce the Court of Appeal to interfere with the exercise of that discretion if the registrar comes to a right conclusion on the facts. But if the Court of Appeal is of opinion that the conclusion come to by the registrar as to the facts is erroneous, the Court of Appeal will vary his decision.

(3) That the Court has power to give costs against an undischarged bankrupt, and, in a case in which it thinks right, it will exercise that power.

THIS was an appeal on behalf of the *Castle Mail Packet Company*, creditors of the bankrupt *Payne*, against an order of the registrar suspending the discharge of the said bankrupt for twelve months.

The ground of the appeal was that the order of the registrar was too lenient, and that the discharge ought, under the circumstances, to have been refused altogether.

The bankrupt *Payne* had acted as broker for the present appellants, by whom an action was brought against him to recover the sum of something like 11,000*l.*, which they alleged he had misappropriated.

*Payne* thereupon became bankrupt, and upon his subsequently applying for his order of discharge, the present appellants opposed that application on the ground that he had been guilty of a fraudu-



lent breach of trust in relation to them, and had also traded after being insolvent.

The official receiver reported that the bankrupt had continued to trade after he knew that he was insolvent, but that he had not committed any other offence under section 28 of the Bankruptcy Act, 1883.

The learned registrar held that upon the evidence there had been a breach of trust, but that there had been no fraud, and he suspended the order of discharge for twelve months.

From this order the *Castle Mail Packet Company* now appealed.

*Winslow, Q. C. (Herbert Reed with him) :* for the appellants.

The order of the registrar is much too lenient. The discharge ought to have been refused altogether. The learned registrar took a mistaken view of the facts. The bankrupt acted as broker to the company, and as such he had to pay over to them freights received. This he did not do. He retained moneys and sent in fictitious accounts. Within three years there was a deficiency amounting to something like 12,000*l.* When the company sought to recover this the bankrupt set up a fraudulent claim against them. Conduct such as this comes clearly within section 28, subsection 3 (h) of the Bankruptcy Act, 1883, which provides as one of the reasons for refusing a bankrupt's discharge, "That the bankrupt has been guilty of any fraud or fraudulent breach of trust." The case could only be met by refusing the bankrupt's discharge altogether.

*E. Cooper Willis, Q. C. :* for the bankrupt Payne.

In a case like this the registrar has a discretion under section 28, subsection (2) of the Bankruptcy Act as to the amount of punishment to be inflicted, and this Court will not readily interfere with the exercise of that discretion. The registrar came to the conclusion that some agreement existed between the parties by which the bankrupt was to pay over to the company moneys received from time to time subject to deductions for his own account. Moreover, there is no right of appeal here to the appellants. They have no *locus standi*. Section 104, subsection (2) of the Bankruptcy Act, 1883, provides that "Orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal

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as follows, &c." A creditor is not within the meaning of that section a "person aggrieved" by the granting of an order of discharge.

THE MASTER OF THE ROLLS (LORD ESHER):

Judgment.

In this case the bankrupt *Payne* applied to the registrar for his order of discharge. That application was opposed by the present appellants, the *Castle Mail Packet Company*, on the ground that the bankrupt had been guilty of a fraudulent breach of trust in relation to them, and had also continued to trade after knowing himself to be insolvent. Upon the evidence the registrar held that although there had been a breach of trust, there had been no fraud, and that the offence found against the bankrupt of trading after insolvency would be met by suspending for twelve months his order of discharge. The present appellants are not satisfied with that decision, and they now appeal from it and say that no order of discharge ought to have been granted to the bankrupt at all. Now, if this Court agreed with the registrar as to the state of the facts in this case, it would be difficult for us, and we should be very unwilling to interfere with his decision. Except in certain special cases which do not apply here the registrar has a discretion under section 28 of the Bankruptcy Act as to the amount of the punishment to be inflicted, and it would require a very strong case to induce this Court to interfere with the exercise of that discretion if the registrar has come to a right conclusion on the facts. But if this Court takes a different view and is of opinion that the conclusion come to by the registrar as to the facts is erroneous, he cannot then be said to have exercised any discretion as to the amount of punishment. In this case the question is, in fact, was there fraudulent conduct on the part of the bankrupt? It was the duty of the bankrupt to collect moneys for goods and passengers on the appellants' steamers and to account to his employers for the sums which he received. He acted as their broker and the general rule is either to send in accounts from time to time or to pay over the sums received subject to proper deductions. It does not appear that the bankrupt was bound to hand over the very cheques he received or to send the money to the company every day. But he was bound, within a reasonable time, to send in his account, and he

was also bound not to state those accounts in such a way as to mislead his employers into supposing that he had not received moneys which he had, in fact, received. If he used for his own purposes money as to which he ought to account and then gave misleading accounts to hide that transaction, he was guilty of a gross fraud. Here the bankrupt clearly traded after being insolvent, and he is shown to have received moneys in excess of any proper deductions, in respect of which he sent in misleading accounts. Finally he set up a false claim against the company. On the evidence I am clearly of opinion that the bankrupt has been guilty—if not strictly of a fraudulent breach of trust—at any rate of a fraud within the meaning of section 28, sub-section 3 (*h*). The facts on which we decide this case, therefore, are a different state of facts from those upon which the registrar exercised his discretion. The registrar never exercised any discretion on that state of facts, and we must refuse, without any terms at all, the bankrupt's application for his discharge, and allow this appeal with costs.

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LINDLEY, L.J. :

I am of the same opinion. It is impossible to say that the appellants in this case are not entitled to appeal. An unpaid creditor is clearly a person who may be aggrieved by the granting of an order of discharge, for it affects his remedies for his debt. Then as to the other part of the case, I entirely agree with what the Master of the Rolls has said. The registrar has a discretion as to the amount of punishment to be inflicted, and if he had taken the same view of the facts as we do, it would have been difficult for us to interfere. But he took an entirely different view, and did not give due effect to the evidence which was before him.

LOPES, L.J. :

I admit I am rather at a loss to understand the decision of the registrar in this case. On the facts, which are practically undisputed, the bankrupt was clearly guilty of fraudulent conduct. As to the other point, that the appellants are not persons "aggrieved" within section 104 of the Bankruptcy Act, I am clearly of opinion

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that unpaid creditors are persons aggrieved, and are entitled to appeal.

*Appeal allowed with costs.*

*E. Cooper Willis, Q.C. :*

With all respect, I would submit that it is not the usual practice to give costs against an undischarged bankrupt.

THE MASTER OF THE ROLLS :

We have the power to do so, and we think it right to do so in the present case.

*Order accordingly.*

Solicitors : *Parker, Garrett & Parker*, for the Castle Mail Packet Company.

*Redpath & Holdsworth*, for the bankrupt Payne.



COURT OF  
 APPEAL.

BEFORE THE  
 MASTER OF  
 THE ROLLS,  
 LINDLEY, L.J.,  
 LOPES, L.J.

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Nov. 15th.

## PRACTICE.

IN RE GENESE, EX PARTE KEARSLEY & CO.

*Bankruptcy Act, 1883, section 23.*

*Composition or Scheme of Arrangement—Confirmation of Scheme—Approval of Court—Discretion of Registrar.*

*Held :* (1) That where the creditors of a bankrupt after adjudication, by special resolution resolve, under section 23 of the Bankruptcy Act, 1883, to entertain a proposal for a composition or scheme of arrangement of the bankrupt's affairs, such special resolution must be confirmed at a second meeting of the creditors in the same manner as a special resolution under section 18 of the Act resolving before adjudication to entertain a like proposal.

(2) That where application is made to the Court for approval of a composition or scheme, the registrar must exercise a judicial discretion on the whole case, and the Court of Appeal will not disapprove of his decision, except on the clearest ground.

The registrar ought to look both at the interests of the creditors and the conduct of the debtor : and so far as the effect of the approval of the composition or scheme will be to release the debtor from liability, his conduct ought to be carefully examined : but regard must also be had for the interests of the creditors, and if the composition or scheme is clearly the best thing for the creditors, the registrar ought to have due regard for that fact. The registrar must look closely into all the circumstances and exercise his discretion thereon.

SEE ALSO : *In re Barlow, Ex parte Thornber*, *post*, page 304.

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THIS was an appeal on behalf of certain creditors of the bankrupt, *S. Genese*, against an order of the registrar sanctioning a composition of 3s. in the pound, which had been agreed to by the creditors under section 23 of the Bankruptcy Act, 1883, by which section a power to accept a composition or scheme is given to creditors after bankruptcy adjudication.

Section 23, sub-section (1), provides that "Where a debtor is adjudged bankrupt the creditors may, if they think fit, at any time after the adjudication, by special resolution, resolve to entertain a proposal for a composition in satisfaction of the debts due to them under the bankruptcy, or for a scheme of arrangement of the bankrupt's affairs ; and thereupon the same proceedings shall be taken and the same consequences shall ensue as in the case of a composition or scheme accepted before adjudication."

By section 18, sub-section (1), "The creditors may at the first meeting or any adjournment thereof, by special resolution, resolve to entertain a proposal for a composition in satisfaction of the debts due to them from the debtor, or a proposal for a scheme of arrangement of the debtor's affairs. (2) The composition or scheme shall not be binding on the creditors unless it is confirmed by a resolution passed (by a majority in number representing three-fourths in value of all the creditors who have proved) at a subsequent meeting of the creditors, and is approved by the Court. (4) The debtor or the official receiver may, after the composition or scheme is accepted by the creditors, apply to the Court to approve it, and notice of the time appointed for hearing the application shall be given to each creditor who has proved. (5) The Court shall,

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before approving a composition or scheme, hear a report of the official receiver as to the terms of the composition or scheme, and as to the conduct of the debtor, and any objections which may be made by or on behalf of any creditor. (6) If the Court is of opinion that the terms of the composition or scheme are not reasonable, or are not calculated to benefit the general body of creditors, or in any case in which the Court is required under this Act where the debtor is adjudged bankrupt to refuse his discharge, the Court shall, or if any such facts are proved as would under this Act justify the Court in refusing, qualifying or suspending the debtor's discharge, the Court may, in its discretion, refuse to approve the composition or scheme."

Section 28 of the Act relates to the question of a bankrupt's discharge, and by sub-section (3) of that section, amongst the facts which will justify the Court in refusing, qualifying, or suspending a debtor's discharge, it is provided, "(f) That the bankrupt has within three months preceding the date of the receiving order, when unable to pay his debts as they become due, given an undue preference to any of his creditors. (g) That the bankrupt has on any previous occasion been adjudged bankrupt, or made a statutory composition or arrangement with his creditors."

In May, 1885, a receiving order was made against the debtor, *S. Genese*, his liabilities being stated at about 9,200*l*.

The debtor was adjudicated bankrupt, and after the adjudication the creditors passed a special resolution under section 28 of the Act to accept a composition of 3*s*. in the pound offered by the bankrupt in satisfaction of their debts. This resolution was confirmed by a three-fourths majority at a subsequent meeting.

On application to the Court to approve the composition, the official receiver reported that, having regard to the bankrupt's estimate of his assets and liabilities contained in his statement of affairs, the proposed composition did not appear to be either reasonable or calculated to benefit the general body of creditors.

An estimate was, however, made by the trustee in the bankruptcy of the present value of the assets, and of the amount which would probably be required for costs and other expenses, according to which estimate he showed that the assets would scarcely be sufficient to pay the proposed composition, and in his opinion would

not realise 3s. in the pound if the bankruptcy proceedings were continued.

The learned registrar, notwithstanding the opposition of certain creditors, approved the composition.

From this approval the dissenting creditors now appealed.

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*Muir Mackenzie* : for the dissenting creditors.

This composition cannot be upheld, because the resolution by which it was accepted was not properly confirmed. A composition or scheme is not binding on the creditors unless it is confirmed by a resolution passed by a majority in number representing three-fourths in value of all the creditors who have proved at a subsequent meeting of the creditors, and is approved by the Court. As a matter of fact the confirmatory resolution here was not passed by the proper majority. Moreover, this composition is unreasonable. The trustee alleges that most of the debts due to the bankrupt are bad debts, but that is not admitted. Much more of the assets could be realised. Since the bankruptcy the business has been carried on by the trustee, whose charges are 500l. There is 500l. for costs to his solicitor, the expenses thus amounting to 1,000l. That sum is excessive. The assets have not been made the most of, and if the bankruptcy is allowed to go on, much more may be realised by the creditors. Further, the conduct of the debtor here has been such that he would not be entitled to an unqualified discharge in bankruptcy, and therefore this composition ought not to have been sanctioned. The bankrupt has been guilty both of giving a fraudulent preference, and has made a previous statutory composition with his creditors.

*Herbert Reed* : for the bankrupt.

The question of approving a composition or scheme is one for the discretion of the registrar, with the exercise of which a Court of Appeal will not lightly interfere. He has a judicial discretion, and this Court will not readily set aside an order made by him. It is the duty of the registrar to form his own judgment. With regard to the question of the confirmation, in the case of a composition or scheme under section 23 of the Act, a confirmatory resolution is not required at all. Section 23 provides that, "Where a debtor is

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adjudged bankrupt, the creditors may, if they think fit, at any time after the adjudication, by special resolution, resolve to entertain a proposal for a composition in satisfaction of the debts due to them under the bankruptcy, or for a scheme of arrangement of the bankrupt's affairs; and thereupon the same proceedings shall be taken, and the same consequences shall ensue as in the case of a composition or scheme *accepted* before adjudication." And section 18, sub-section (4), runs thus: "The debtor or the official receiver may, after the composition or scheme is *accepted* by the creditors, apply to the Court to approve it." The word "*accepted*" in that section refers to a composition or scheme as to which both a special and a confirmatory resolution has been passed. When, therefore, a special resolution has been passed under section 23, a confirmatory meeting is not required, but the proceedings are to be taken up as they would be under section 18, sub-section (4). The reason for this difference is quite intelligible. Where the proceedings are under section 18 the creditors cannot know until they come to the first meeting whether any composition or scheme is to be proposed. In proceedings under section 23 on the other hand, the notice of the meeting called to pass the special resolution must state the object of the meeting, and the terms of the composition or scheme proposed. In any case this question does not arise here, as the confirmatory resolution was passed by the proper majority. The total amount of the debts was 9,200*l.* The amount of debts of the creditors assenting was 7,020*l.*

THE MASTER OF THE ROLLS (LORD ESHER):

Judgment.

In this case, after bankruptcy the bankrupt proposed a composition to his creditors, and that composition was agreed to by them under section 23 of the Bankruptcy Act, and subsequently received the sanction of the Court. Certain of the creditors, however, dissented from the proposal of the bankrupt, and were desirous that the bankruptcy proceedings should be continued. They opposed the application to approve the composition, and now appeal from the decision of the registrar in this respect. The question which we have to consider is whether under the circumstances the registrar was right in giving the sanction of the Court. Now the first objection which was taken was that in the case of a



composition or scheme a resolution passed at a subsequent meeting by a statutory majority of the creditors, confirming the original acceptance of the composition or scheme, is required, and it was alleged that in this case the confirmatory resolution was not in fact passed by the proper majority. On the other hand, it was argued that in the case of a composition or scheme under section 23 of the Act, a confirmatory resolution is not required at all, and in any event the resolution here had been passed by the proper majority. I am of opinion that the confirmatory resolution here was passed by the proper majority, and therefore it is not absolutely necessary for the purposes of the present case to decide upon the other point raised. At the same time it is advisable to express our opinion upon it, and looking at the enactment and the rules, I have no doubt that a confirmatory meeting is as necessary under section 23 of the Act as under section 18. Section 23 says that "Where a debtor is adjudged bankrupt the creditors may, if they think fit, at any time after the adjudication, by special resolution, resolve to entertain a proposal for a composition in satisfaction of the debts due to them under the bankruptcy, or for a scheme of arrangement of the bankrupt's affairs; and, thereupon, the same proceedings shall be taken and the same consequences shall ensue as in the case of a composition or scheme accepted before adjudication." By section 18, "The creditors may at the first meeting, or any adjournment thereof, by special resolution, resolve to entertain a proposal for a composition in satisfaction of the debts due to them from the debtor, or a proposal for a scheme of arrangement of the debtor's affairs." Then, by subsequent sub-sections, this composition or scheme shall not be binding on the creditors unless it is confirmed by a statutory majority at a subsequent meeting, and after the composition or scheme is accepted by the creditors the Court must be applied to to approve it. The terms "entertain" and "accept" are used as synonymous. In both cases, whether before or after adjudication, it is at the first meeting that the creditors "entertain," and in that sense "accept" the composition or scheme. But in both cases that which is done at the first meeting must be confirmed. This being so, it became the duty of the registrar to consider the composition, and to approve of it if he thought it reasonable. If he thought the composition was not

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reasonable, or if he was not satisfied that it was reasonable, it was his duty to reject it. Now this is a peculiar case. The debtor has been guilty of various offences. He has been guilty of a fraudulent preference, and a fraudulent preference is not a light matter. It is an attempt to cheat creditors. It was argued that if the debtor has been guilty of any offence under section 28, sub-section (3), the registrar ought not to sanction the scheme however advantageous it might be to the creditors. I will not go quite so far as that, though certainly the registrar should look closely into it. So far as the effect of the approval will be to release the debtor from liability, his conduct ought to be very carefully examined. But the registrar must also have regard for the creditors, and if the composition is clearly the best thing for them, I cannot think the registrar is bound in law to refuse to approve it in consequence of offences under section 28, sub-section (3). The registrar ought to look at both sides. It is a matter of discretion, and the Court of Appeal ought not to interfere unless it is clear the decision is wrong. Now what are the facts here? One result of this composition is to set up the business again to the advantage of the debtor, and I must admit I look with very great distrust at a scheme so evidently friendly towards the debtor. I have considerable doubt also whether much more of the assets could not be collected, and I cannot believe that so many of the customers of the bankrupt are unable to pay their debts. Then there comes the trustee with his claim for 1000*l.*—that is, 500*l.* for his own expenses of management and 500*l.* for costs. With regard to this latter sum the trustee succeeded in the litigation, and will have his costs paid, and the other charge is for the trustee managing a business of which he knew nothing. Looking at all these facts, I am not satisfied that the composition in this case is a reasonable one, or that the assets would not realise more in a bankruptcy. I do not think the registrar ought to have been satisfied with it, and I am of opinion that the composition ought not to be approved.

LINDLEY, L. J.

I am of the same opinion. This case has raised some important questions. With regard to the first point, though the question

does not arise in the present case, I think that a confirmation of the creditors' acceptance of a composition or scheme under section 23 of the Act is necessary at a second meeting. Then as to the duty of the registrar, and this Court in dealing with cases of this kind. A report of the official receiver is to be made as to the terms of the composition or scheme and as to the conduct of the debtor, and if the terms are not reasonable the composition or scheme is not to be approved. It is the duty of the registrar to look not only at the interests of the creditors, but at the conduct of the debtor. In certain cases mentioned in section 28, however beneficial the scheme might be to the creditors, it is the duty of the registrar to refuse to sanction it. The present case is not one in which it is charged that the debtor has so misconducted himself as to require this. But even in a case like the present the conduct of the debtor must be taken into consideration, and that ingredient is of the more importance when it is extremely doubtful whether the proposed scheme is the best thing for the creditors. Here in the first place it looks very much like a scheme to preserve the business for the advantage of the debtor. Then there was the attempt at a fraudulent preference, and under all the circumstances I think the composition ought not to be approved. The registrar ought to take great care that an improper scheme is not forced upon dissentient creditors, and I am of opinion that is the result of the order in the present case.

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LOPES, L.J.

I quite agree. I do not think that this is a reasonable scheme. A composition or scheme must be considered both with regard to the interests of the creditors and the conduct of the debtor. On both these grounds I am of opinion that the composition in the present case ought not to be sanctioned. I think also that if the bankruptcy is allowed to go on further assets may be realised.

*Appeal allowed with costs.*

Solicitors : *R. Raphael*, for the dissenting creditors.

*Bagot Harte & Co.*, for the debtor.

## PRACTICE.

BEFORE  
MR. JUSTICE  
CAVE.  
1886.

IN RE UNDERHILL, EX PARTE BUDDEN.

*Vivâ voce Evidence on Motion—Practice.*

Nov. 22nd.

Where it is desired to use *vivâ voce* evidence at the hearing of a motion, and both parties consent, a written notice to that effect may be given to the clerk of the Court, and application made to the Judge to fix a suitable day for the hearing.

But if both parties do not consent, the matter must come on as a motion in the ordinary way.

COMPARE: *In re Genese, Ex parte Kearsley & Co.*, see *ante*, page 57.

*In re Hagan & Co., Ex parte Adamson & Ronaldson*, see *ante*, page 117.

THIS was an *ex parte* application for leave to use *vivâ voce* evidence at the hearing of the motion.

*Herbert Reed*: made the application.

[CAVE, J.: Have you given any notice to the other side?]

No, my Lord. I was not aware such notice was necessary.

CAVE, J.:

The matter had better stand over for you to mention it to the other side, and with regard to this question of *vivâ voce* evidence let it be understood that if it is desired to use such evidence at the hearing of a motion, where both parties agree, they may give a written notice to Mr. *Falkner*, the clerk of the Court, who will enter the case in a list of cases to be so heard. The matter must then be mentioned to me to fix a suitable day. When, however, both parties do not consent the matter must come on as a motion in the ordinary way.

Solicitors: *Thomson and Ward*, for the applicant.

## PRACTICE.

## IN RE FORD, EX PARTE FORD.

*Bankruptcy Act, 1883, section 4, sub-section 1 (g).*

*Bankruptcy Notice—"Final Judgment"—Interpleader Order—Stay of Execution.*

On August 23rd, 1886, judgment was recovered against the debtor, and execution was issued, under which the sheriff levied on August 26th.

On September 1st, a third person having claimed the goods, an interpleader order was obtained by the sheriff under which the claimant paid 120*l.* into Court, and thereupon, in pursuance of the order, the sheriff withdrew from possession.

On September 20th the issue in the interpleader was settled, but on September 27th, before such issue was decided, the judgment creditor served on the debtor a bankruptcy notice under section 4, sub-section 1 (g), of the Bankruptcy Act, 1883.

On an appeal from the decision of the County Court Registrar refusing to set aside this notice,

*Held*: That when the interpleader order was made and an issue directed, it was in substance a stay of execution until such issue in the interpleader was decided: and that the creditor, not being in a position to issue execution on the judgment, was not entitled to serve a bankruptcy notice on the debtor at the date when such notice was served.

DIVISIONAL  
COURT.

BEFORE  
CAVE, J.,  
and  
A. L. SMITH, J.  
1886.

Nov. 29*th*  
and  
Dec. 13*th*.

THIS was an appeal on behalf of the debtor *Ford* against a decision of the registrar of the Gloucester County Court refusing to set aside a bankruptcy notice.

The case raised an important question under section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, which provides that a debtor commits an act of bankruptcy, "(g) If a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him in England, or, by leave of the Court, elsewhere, a bankruptcy notice under this Act, requiring him to pay the judgment-debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order

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giving leave to effect the service, either comply with the requirements of the notice, or satisfy the Court that he has a counter-claim, set-off, or cross-demand which equals or exceeds the amount of the judgment-debt, and which he could not set up in the action in which the judgment was obtained."

On August 23rd, 1886, judgment for the sum of 93*l.* 9*s.* 6*d.* was obtained by Messrs. *Edward Webb & Co.*, against the debtor *Ford*, and execution was issued under which the sheriff levied on August 26th.

On September 1st, 1886, a claim was made by a third person to the goods seized, and the sheriff thereupon interpleaded, and an order was made on the interpleader that on payment of 120*l.* into Court by the claimant within seven days the sheriff should withdraw. This sum was duly paid into Court, and the sheriff withdrew from possession.

On September 20th the issue in the interpleader was settled, but on October 8th the judgment creditor obtained leave to abandon the interpleader proceedings.

Meanwhile, however, on September 27th the judgment creditor had served on the debtor a bankruptcy notice under section 4, sub-section 1 (g).

On October 15th the debtor applied to the registrar of the County Court to set aside this notice on the ground that the judgment on which it was founded was not a judgment on which execution could be issued, but the application was refused.

From that refusal the debtor *Ford* now appealed.

*Duke*: for Mr. Ford the judgment debtor.

At the time the bankruptcy notice was taken out the judgment was not a judgment on which execution could be had. The only judgment on which a bankruptcy notice can be founded is a judgment on which execution can at once be issued. This case is within several recent decisions. In *In re Ide, Ex parte Ide* (see *ante*, page 239), it was held, "That a creditor who has obtained a final judgment cannot under section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, issue a bankruptcy notice against the judgment debtor, unless such creditor is also in a position to issue immediate execution on the judgment." That case confirmed *In*

*re Woodall, Ex parte Woodall* (see *ante*, Volume I., page 201, L. R. 13 Q. B. D. 479) where the Court of Appeal also held that the words "execution thereon not having been stayed" shew that the creditor spoken of must be a person who is in a position to issue execution upon the judgment. Then as to whether this was a judgment on which execution could issue, in the case of *Chapman v. Bowlby* (8 M. & W. 249), it was held that where there was a writ of *fi. fa.* and seizure had taken place, no second writ could be issued until a return had been made. Here no return had been made of the first writ. It is not to be contended that execution could be had on this judgment. The execution creditor cannot be a party to interpleader proceedings and also serve a bankruptcy notice.

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 IN RE  
 FORD,  
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*E. Cooper Willis, Q.C. (Hickey with him)*: for the creditor.

The whole question is, Do we bring ourselves within section 4, sub-section 1 (g)? The words of the section are clear:—"If a creditor has obtained a final judgment \* \* \* and execution thereon not having been stayed." Now stayed means stayed for appeal; or as in the case of *In re Ide, Ex parte Ide* (see *ante*, page 239), which has been cited, where it was held that "Where final judgment is obtained against a firm, a bankruptcy notice cannot be issued against a member of such firm who has not been served with the writ, and has not appeared, or admitted that he is or has been adjudged to be a partner, unless under Order XLII., Rule 10, of the Rules of the Supreme Court, 1883, leave to issue execution against such partner has been obtained." In *In re Woodall, Ex parte Woodall* (see *ante*, Volume I., page 201: L. R. 13 Q. B. D. 479), it was an executor of a judgment creditor. In this case execution was not stayed.

[A. L. SMITH, J.—Was not the order of September 1st a stay?]

A creditor may issue a bankruptcy notice pending an execution. On September 27th there was no stay within the meaning of the section, and the registrar was right in not dismissing the bankruptcy notice.

1886.

December 13th.

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IN RE  
FORD,  
EX PARTE  
FORD.

On this day Mr. Justice CAVE delivered the judgment of the Court as follows:—

Judgment.

This is an appeal against the refusal by the registrar of the County Court at Gloucester to set aside a bankruptcy notice issued under section 4, sub-section 1 (g), of the Act of 1883, under the following circumstances:—

The respondent had obtained judgment against the appellant, and had issued execution under which the sheriff levied on the 26th of August last. On the 1st of September a third person claimed the goods, and the sheriff thereupon obtained an interpleader order under which the claimant paid 120*l.* into Court, and thereupon in pursuance of the order the sheriff withdrew from possession. On the 20th of September the issue in the interpleader was settled, but on October 8th the judgment creditor obtained leave to abandon the interpleader proceedings. Meanwhile, however, the judgment creditor had, on the 27th of September, served on the appellant the bankruptcy notice in question, which the registrar on the 15th of October refused to set aside.

Section 4, sub-section 1 (g), permits the judgment creditor to serve a bankruptcy notice on the debtor where execution on the judgment has not been stayed, and the question we have to decide is whether in this case execution had been stayed.

Now it has been laid down by Lord Justice BOWEN in *Ex parte Chinery* (L. R. 12 Q. B. D. 342, 346), that words found in a section of an Act of Parliament which is defining acts of bankruptcy should be construed as strictly as if they occurred in a section defining a misdemeanour, because the commission of an act of bankruptcy entails disabilities on the person who commits it. Again, in *Ex parte Woodall*, where a similar question was under discussion, the Court of Appeal held that the words "execution thereon not having been stayed," show that the creditor spoken of must be a person who is in a position to issue execution upon the judgment. *In re Ide* (3 Morrell, 239), is to the same effect.

In this case the sheriff had seized sufficient goods to produce the sum for which he was to levy, but when the interpleader order



was made, and an issue directed, he could do nothing more until that issue had been decided; for until it was decided he could not know whether he should make a return of *feri feci*, or proceed to levy on other goods of the debtor in his bailiwick, or if there were no such other goods, make a return of *nulla bona*. Nor could the judgment creditor issue another *fi. fa.* into another county, for as is established by *Chapman v. Bowlby* (8 M. & W. 249), a second *fi. fa.* cannot be issued until the first is returned, for if anything has been recovered under the first writ the second must recite it, and must be indorsed with a direction to levy the balance only; and the sheriff in this case could not return the first writ until the issue was decided, for until then he could not know whether to make a return of *feri feci* or *nulla bona*. This was, therefore, in substance a stay of execution until the issue in the interpleader was decided.

Moreover, a consideration of the remaining part of the section is not unimportant. The notice must require the debtor to pay the judgment debt in accordance with the terms of the judgment. How could the notice comply with this provision so long as the issue in the interpleader was undecided? If the issue were decided in favour of the execution creditor, it would follow that the sheriff had, on the 27th of August, seized goods of the debtor to an extent sufficient to satisfy the judgment, and consequently that nothing remained to be paid. Why should the debtor be required to pay or give security for a debt which had been in substance levied on his goods because some third person chose to set up an unfounded claim to them. It was open to the judgment creditor to get an order in Chambers permitting him to abandon the issue in the interpleader, and then again he would be in a position to enforce his judgment by levying on other goods of the debtor. But when this notice was served upon the debtor that course had not been taken, and we come to the conclusion that the creditor was not, on the 27th of September, in the position required by the section—that is to say, although he had obtained a final judgment, he was not then in a position to issue execution. The appellant, therefore, was entitled to the order he asked for, and the decision of the registrar must be reversed, and the bankruptcy notice must be set aside with costs here and below.

*Appeal allowed with costs.*

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*E. Cooper Willis, Q.C.*—I formally ask your Lordship for leave to appeal, if hereafter it should be deemed advisable to do so.

CAVE, J.: You may have leave.

Solicitors: *C. Curtis*, for the debtor Ford.

*Walker, Son, Field*, for the creditor.

Cases relied upon or referred to:—

*In re Ide, Ex parte Ide*, see ante, page 239.

*In re Woodall, Ex parte Woodall*, see ante, Volume I., page 201 :

L. R. 13 Q. B. D. 479.

*In re Chinery, Ex parte Chinery*, see ante, Volume I., page 31 :

L. R. 12 Q. B. D. 342, 346.

*Chapman v. Bowlby*, 8 M. & W. 249.

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DIVISIONAL  
 COURT.

BEFORE  
 CAVE, J.,  
 and  
 A. L. SMITH, J.

1886.  
 Nov. 29th  
 and 30th.

IN RE WEBBER, EX PARTE WEBBER.

*Bankruptcy Act, 1883, section 53.*

*Retired Officer of the Indian Army—Compassionate Allowance—Right of Court to direct Payment thereof to Creditors.*

*Held*: That a compassionate allowance granted to a retired Indian officer by the Secretary of State for India under the powers conferred on him by the Government of India Act, 1858—which said allowance is not provided for in the regulations of the service, and the granting of it does not form one of the terms upon which the service was originally entered upon, but is a mere act of grace—does not fall within the words of section 53, sub-section (2), of the Bankruptcy Act, 1883, and the Court will not make an

order under that section directing a certain sum to be paid thereout to the trustee in the bankruptcy of such officer for the purpose of distribution amongst his creditors.

In order that section 53 may apply, the payment must be one to which the bankrupt has a legal or equitable claim.

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**T**HIS was an appeal on behalf of the bankrupt, Captain *Edward John Webber*, from an order of the learned judge of the Norwich County Court, directing that the sum of 50*l.* out of an allowance of 7*s.* a day made to the said bankrupt, should be paid to the trustee in the bankruptcy for the purpose of distribution amongst his creditors.

Captain *Webber* was formerly in the employ of the Indian Government, and was compulsorily retired. He was not entitled to receive any half-pay or pension, but what was termed a compassionate allowance of 7*s.* a day was granted by the Secretary of State for India under the powers conferred upon him.

The nature of this allowance was set out in an affidavit of the bankrupt as follows:—

“(2) This allowance was made by the Secretary of State for India in Council by virtue of the general powers conferred upon him by the Government of India Act, 1858 (21 & 22 Vict. c. 106, s. 41).

“(3) That Act confers upon the Secretary in Council all the powers of dealing with the Indian revenues which were formerly exercised by the East Indian Company, who were in the habit of making compassionate and charitable grants to their servants.

“(4) There is no special fund for the payment of this allowance. It is paid out of the general Indian revenues, and is debited to the civil and not military charges. It is in no way a charge upon the English revenue or payable thereout.

“(5) The allowance is of an entirely different nature to a pension, half-pay, or other payment of that kind. It is not provided for in the regulations of the service, and the granting of it does not form one of the terms upon which the recipient originally entered the service. The recipient has no claim or right to it. The grant is a voluntary act of grace, being in fact made in special cases where the recipient has no claim to a pension.

“(6) In every case it is a matter entirely within the discretion

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of the Secretary of State in Council whether any and what allowance, and for what period it shall be granted, and each case is dealt with by the Secretary in Council on its merits.

“(7) The allowance is intended for the personal subsistence of the recipient and his family, regard being had to his position and means. Were it known to the Secretary of State that the recipient from his position or means was not in need of it, the allowance would not be made, and accordingly in certain cases provision has been made by the Secretary of State in Council for discontinuing the allowance when it was thought the recipient would no longer require it for the maintenance of himself and his family. If discontinued for any reason, the office would not recognise any claim to the allowance by the recipient, it being revocable by the exercise of the same discretion by which it was granted.

“(8) The allowance cannot be commuted, charged, or otherwise incumbered or anticipated, and no dealing with it by way of anticipation by the recipient would be recognised by the office, and up to the present time my own is the only case in which it has come to the knowledge of the office that an order has been made for payment of any part of a compassionate allowance for the benefit of the recipient's creditors.”

In December, 1885, Captain *Webber* was adjudicated bankrupt, and upon the application of the trustee in the bankruptcy, the learned County Court Judge, under section 53 of the Bankruptcy Act, 1883, directed that the sum of 50*l.* out of this allowance of 127*l.* should be paid yearly by the bankrupt by quarterly instalments for the purpose of being applied to the discharge of his liabilities until the Court should otherwise order.

From this decision Captain *Webber* now appealed.

*Swinfen Eady*: for Captain *Webber*.

I submit (1) the Court had no jurisdiction to make this order; and (2), if there is jurisdiction, the sum directed to be paid is far too large. The section under which this order was made is section 53 of the Bankruptcy Act, 1883, which provides: “(1) Where a bankrupt is an officer of the army or navy, or an officer or clerk, or otherwise, employed or engaged in the civil service of the crown, the trustee shall receive for distribution

amongst the creditors so much of the bankrupt's pay or salary as the Court, on the application of the trustee, with the consent of the chief officer of the department under which the pay or salary is enjoyed, may direct. Before making any order under this sub-section, the Court shall communicate with the chief officer of the department as to the amount, time, and manner of the payment to the trustee, and shall obtain the written consent of the chief officer to the terms of such payment. (2) Where a bankrupt is in the receipt of a salary or income other than as aforesaid, or is entitled to any half-pay or pension, or to any compensation granted by the Treasury, the Court, on the application of the trustee, shall from time to time make such order as it thinks just for the payment of the salary, income, half-pay, pension, or compensation, or of any part thereof, to the trustee to be applied by him in such manner as the Court may direct." First as to the question of jurisdiction. This allowance is made under the Act, 21 & 22 Vict. c. 106, s. 41. It is different to a pension or half-pay: it is not provided for by the regulations of the service; and the granting of it does not form one of the terms upon which the recipient originally entered the service. In every case it is within the discretion of the Secretary of State in Council, and is intended for the personal subsistence of the recipient and his family. Under those circumstances I submit the matter is covered by authority. In the case of *Ex parte Wicks*, *In re Wicks* (L. R. 17 Ch. Div. 70; 50 L. J. Ch. 620; 44 L. T. 836), it was held that "a purely voluntary allowance made to a bankrupt is not 'income' within the meaning of section 90 of the Bankruptcy Act, 1869, and no order can be made for the payment of any part of such an allowance, when received by the bankrupt, to the trustee in the bankruptcy. In order that section 90 may apply, the payment must be one to which the bankrupt has a legal or equitable claim." In that case Chief Judge BACON at first held that the allowance was "income," of which the bankrupt was in receipt within the language of section 90, but the Court of Appeal reversed that decision, and Lord Justice JAMES said, "I am unable to agree with the decision of the Chief Judge. I cannot conceive that a voluntary allowance made by a father, a relative, or a friend to a bankrupt, a perfectly voluntary allowance, can be made

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the subject of such an order by the Court of Bankruptcy under the words 'salary or income.' It seems to me that the word means a salary or an income to which the bankrupt is legally or equitably entitled, and not a mere voluntary payment." And the present Master of the Rolls, then Lord Justice BRETT, said, "I think we have no right to reduce an Act of Parliament to a wicked absurdity." It must be something to which the recipient is legally or equitably entitled, and not a mere voluntary payment. This is a sum given to the bankrupt as a grace: he has no legal or equitable title to it. It is open to the India Office to discontinue it, and they can do so without assigning any reason. The Act, 21 & 22 Vict. c. 106, s. 41, simply confers upon the Secretary in Council all the powers of dealing with the Indian revenues which were formerly exercised by the East Indian Company. This allowance does not come within the words of section 53, subsection (2), of the Bankruptcy Act at all.

[A. L. SMITH, J.—"Income" is the only word it can come under.]

Then the case of *Ex parte Wicks, In re Wicks* (L. R. 17 Ch. Div. 70; 50 L. J. Ch. 620; 44 L. T. 886), says the allowance must not be voluntary, but one to which the recipient is legally or equitably entitled. (Counsel also referred to *Ex parte Huggins, In re Huggins*, L. R. 21 Ch. Div. 85; 51 L. J. Ch. 935; 47 L. T. 559.) In any event, the sum ordered by the County Court Judge to be paid out of this allowance is much too large. It is 50*l.* out of 127*l.* a year. That is all the income Captain *Webber* has. He is in ill-health, and cannot earn more.

*Gregson*: for the trustee in the bankruptcy.

This allowance takes the place of half-pay, and is fixed at the same amount. The question is, whether it is property within the vesting orders of the Bankruptcy Act. The test whether it is property under the Bankruptcy Act does not depend on whether a man can sue for it. The allowance in the present case is different from the voluntary allowance in *Ex parte Wicks, In re Wicks* (L. R. 17

Ch. Div. 70; 50 L. J. Ch. 620; 44 L. T. 886). There it was agreed that the payment by the relation would cease altogether if the order of the Court was made. In this case the India Office say they would obey the order.

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[CAVE, J.: They simply say that if the Court is of opinion the order ought to be made they will carry out the directions of the Court.]

Further, in *In re Wicks* nothing had been done to earn the income. In this case it has been earned. If this compassionate allowance is excluded, all pensions to military and civil servants will be excluded. That was clearly not intended. (Counsel referred to *Ex parte Benwell*, *In re Hutton*, L. R. 14 Q. B. D. 301; 54 L. J. Q. B. 53; 51 L. T. 677; *Ex parte Napier*, L. R. 18 Q. B. 692; 21 L. J. Q. B. 332; *Grant v. The Secretary of State for India*, L. R. 2 C. P. D. 445; 45 L. J. C. P. 681; 37 L. T. 188.) At any rate, your Lordships will not interfere with the decision of the County Court Judge as to amount. The County Court Judge knew all the circumstances, and he thought 50*l.* a fair sum.

CAVE, J.:

The question which we have to decide is whether this compassionate allowance comes within section 53 of the Bankruptcy Act, 1883. We have been invited to consider questions connected with half-pay and pensions, but it is not in my opinion necessary to give any opinion whatever as to those matters. It is always dangerous to express an opinion on matters which have not been fully argued, and it is wiser not to travel out of the true course of a case. Now with reference to this compassionate allowance, we have the evidence of the bankrupt, and that evidence is not in any way contradicted by the trustee. The bankrupt says that this allowance was made by the Secretary of State for India in Council in pursuance of his general powers. The general powers are given by the Act 21 & 22 Vict. c. 106, s. 41, and that Act merely provides that the Secretary in Council shall have all the powers of dealing with the Indian Revenues which were formerly

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exercised by the East Indian Company. There is no special fund for the payment of the allowance. It is not provided for in the regulations of the service, and the granting of it does not form one of the terms upon which a recipient enters the service. In every case it is a matter entirely within the discretion of the Secretary of State in Council, and each case is dealt with on its merits. Now it is only necessary to read that affidavit of the bankrupt to see that this compassionate allowance differs entirely from half-pay or pension. It mainly differs in that it does not form one of the terms upon which the recipient enters the service. It is made on the special circumstances of the case, and may be discontinued when the recipient no longer requires it. Those are very material differences from half-pay or pension. We have been referred to cases on the question whether half-pay or pension can or cannot be claimed, but, in my opinion, they do not touch upon this case. The case which applies here is that of *Ex parte Wicks, In re Wicks* (L. R. 17 Ch. Div. 70 ; 50 L. J. Ch. 620 ; 44 L. T. 836), which lays down that the true test is whether the allowance is voluntary or not, and by voluntary I mean, whether it is by mere bounty or whether it can be recovered by legal process. What I suggested during the argument appears to be an example. Suppose a person on engaging a servant agrees with the servant on terms : " I will give you so much a year, and after you have been with me a certain number of years I will give you a retiring allowance of so much per annum ; " then the servant who fulfils his part of the conditions has a right to the allowance which the Court will enforce. But suppose there were no such terms : but after so many years of service a man chooses voluntarily to make an allowance to an old servant ; that would be mere bounty and could not be recovered. In this particular case I am of opinion that the allowance resembles the case of a voluntary bounty of an individual, and does not in the least resemble a half-pay or pension, the terms of which are considered when the service is entered into. It has been said here that the India Office have stated that if an order of the Court is made they will pay the allowance. That is not at all surprising. It is only right that the order of the Court should be obeyed if such order was made. But, in my opinion, this case is covered by the decision in *Ex parte Wicks, In re Wicks* (L. R. 17



Ch. Div. 70; 50 L. J. Ch. 620; 44 L. T. 836), and we follow that case.

A. L. SMITH, J. :

I am of the same opinion. The sole point is whether this compassionate allowance is within section 53, sub-section (2), of the Bankruptcy Act, 1883. The nature of the allowance is stated in the affidavit of the bankrupt, and that is quite uncontradicted. Taking those facts, I am clearly of opinion that this allowance is purely voluntary. It is a mere bounty: a mere gift. That being so, Is this compassionate allowance within section 53, sub-section (2)? It is not within sub-section (1), but it is said to be within sub-section (2), which provides that "Where a bankrupt is in the receipt of a salary or income other than as aforesaid, or is entitled to any half-pay or pension, or to any compensation granted by the Treasury, the Court, on the application of the trustee, shall from time to time make such order as it thinks just for the payment of the salary, income, half-pay, pension or compensation, or of any part thereof, to the trustee, to be applied by him in such manner as the Court may direct." This is clearly not half-pay, pension, or compensation granted by the Treasury; and I particularly wish it to be understood that in this judgment which I am now giving I do not intend in any way to express an opinion on the question of half-pay or pension. The only words in the section under which this allowance could fall are "salary or income." It is not salary, and it is not income. The case of *Ex parte Wicks, In re Wicks* (L. R. 17 Ch. Div. 70; 50 L. J. Ch. 620; 44 L. T. 836) decides that a purely voluntary allowance made to a bankrupt is not "income," and no order can be made for the payment of any part of such an allowance, when received by the bankrupt, to the trustee in the bankruptcy. In order for the section to apply, the payment must be one to which the bankrupt has a legal or equitable claim. I am of opinion, therefore, that the trustee has failed to show that the order of the County Court Judge can be upheld.

*Appeal allowed and order discharged with costs.*

Solicitors: *C. Martelli*, for the bankrupt.

*J. O. Jacobs*, for the trustee in the bankruptcy.

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Cases relied upon or referred to :—

*Ex parte Wicks, In re Wicks*, L. R. 17 Ch. Div. 70 ; 50 L. J. Ch. 620 ; 44 L. T. 836.

*Ex parte Huggins, In re Huggins*, L. R. 21 Ch. Div. 85 ; 51 L. J. Ch. 935 ; 47 L. T. 559.

*Ex parte Benwell, In re Hutton*, L. R. 14 Q. B. D. 301 ; 54 L. J. Q. B. 53 ; 51 L. T. 677.

*Ex parte Napier*, L. R. 18 Q. B. 692 ; 21 L. J. Q. B. 332.

*Grant v. The Secretary of State for India*, L. R. 2 C. P. D. 445 ; 46 L. J. C. P. 681 ; 37 L. T. 188.

## PRACTICE.

DIVISIONAL IN RE SMALL AND SMALL, EX PARTE SMALL AND SMALL.  
 COURT.

BEFORE  
 CAYE, J.,  
 and  
 WILLS, J.  
 1886.

*Bankruptcy Act, 1883, section 28.*

*Discharge—Discharge granted subject to conditions—Entry of Judgment—Form of Order.*

*Dec. 2nd  
 and 3rd.*

An order was made by the County Court Judge directing that the discharge of the bankrupts should be allowed as soon as a sufficient sum was paid to the trustee in the bankruptcy to make up a dividend of 5s. in the pound.

On appeal, the objection was taken that the order in question was wrong in form.

*Held* : That the proper order to be made under the circumstances was that the discharge of the bankrupts should be granted subject to judgment being entered against them under section 28, sub-section (6), of the Bankruptcy Act, 1883, for such amount and under such conditions as set out in the order below.

THIS was an appeal on behalf of the bankrupts *T. H. and G. Small*, against an order of the learned judge of the Derby County Court, suspending the discharge of the said bankrupts

until a sufficient sum was paid to the trustee in the bankruptcy to make a dividend of 5s. in the pound.

In the year 1871 the bankrupts commenced business together as colliery proprietors and coal-owners at the Kilburne Colliery, Derbyshire, having each a capital of about £1,000, but they subsequently purchased two other collieries situate at South Normanton and Stanley respectively.

At first they made large profits, but for some years they had carried on business at a loss, the South Normanton and Stanley Collieries having been ruinously unproductive.

On December 15th, 1885, a receiving order was made against the bankrupts on their own petition, and adjudication followed on the same day.

According to the bankrupts' statement of affairs there were owing at the time the receiving order was made unsecured debts amounting to 18,812*l.* 15*s.* 5*d.*

The amount of assets available for distribution among the unsecured creditors after allowing the sum necessary to satisfy preferential claims, was set down in the statement at 13,964*l.* 6*s.* 1*d.*, but this amount proved to be largely in excess of the actual results, which it was alleged would not exceed at most 2,000*l.*, whilst the liabilities were found to be much greater than the amount at which they were stated.

The official receiver in his report stated—(1) That the bankrupts had omitted to keep proper books of account. They had kept the usual books giving a record of the coal sold, and also bought, and ledgers showing the amounts owing to their different creditors. But they had not kept proper cash-books, nor a general ledger, nor any accounts showing the profits and loss from the various collieries. They had kept no account of their drawings, nor had they taken stock or made out annual balance-sheets. (2) That the bankrupts had continued to trade after they knew (or at any rate ought to have known) themselves to be insolvent. So long ago as August, 1885, an execution was levied against them by the sheriff of Derbyshire for a sum of 39*l.*, and both prior and subsequently to that date numerous writs for undisputed debts had been issued against them. The official receiver, however, submitted for the consideration of the Court whether the bank-

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rupts should be held equally responsible for these offences, the course of business being that *G. Small* had the entire conduct and control of the collieries, and of the books of the partnership, whilst *T. H. Small* attended solely to the sale of the coal; and he asserted that except his brother's statements and assurances on the subject, he remained altogether ignorant of the true state of the partnership affairs until shortly before the bankruptcy.

The learned County Court Judge ordered that the discharge of the bankrupts should be allowed as soon as a sufficient sum was paid to the trustee to make a dividend of 5s. in the pound.

From this order the bankrupts now appealed.

*E. Cooper Willis (Hextall with him)* : for the bankrupts.

The order is wrong. Section 28 of the Bankruptcy Act, 1883, deals with the question of discharge, and the Court may either grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property. But such a condition as that imposed here was never contemplated. The order is not in accordance with the form in the Schedule to the Rules either of 1883 or 1886. An undischarged bankrupt is placed in a serious position. He cannot trade, for under section 31 of the Act, if he obtains credit to the extent of 20l. without disclosing his position, he is guilty of a misdemeanour. In the case of *In re Clarkson, Ex parte Allestree* (see ante, Volume II., page 219), where an order was made by the same County Court Judge granting the bankrupt his discharge on the terms that he should pay to the trustee the sum of 700l. out of his earnings or income or any after-acquired property, this Court varied that order and directed that the discharge of the bankrupt should be granted on his consenting to judgment being entered against him in the terms of section 28, sub-section (6), of the Bankruptcy Act. Some reasonable order of that kind might be made here.

*Smyly* : for the trustee in the bankruptcy.

I admit I cannot support the form of the order. I would sub-

mit, however, that this order should be modified to the form of order in the case of *In re Salaman, Ex parte Salaman* (see *ante*, Volume II., page 61 ; L. R. 14 Q. B. D. 936). There the order was that the discharge of the bankrupt should be granted "subject to the bankrupt filing annually a verified statement of his earnings and income, and after retaining 300*l.* a year for the support of himself and his family, he must pay over the balance for the benefit of his creditors until he had paid them a dividend of 10*s.* in the pound."

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*Muir Mackenzie* : for creditors, the Nottingham Bank.

*Morton Daniel* : for another creditor, Drury Lowe.

*December 3rd.*

CAVE, J. :

My brother and I have considered this matter, and we think an Judgment. order as follows will meet the justice of the case. Roughly speaking, the liabilities are 20,000*l.* and the certain assets 1,000*l.* The bankrupts to have their discharge subject to this order :—"Judgment for 4,000*l.* If the bankrupts pay 500*l.* within four years, judgment to be reduced by another 500*l.*, that is to 3,000*l.* If the bankrupts pay 1,000*l.* within four years, judgment reduced to 2,000*l.* If the conditions are fulfilled, liberty to the bankrupts to apply to the Court at the end of four years for such further reduction as the Court may think fit. The trustee at any time to apply to the Court for leave to issue execution if it is clear the bankrupts are not going on satisfactorily. General liberty to apply. The costs of the trustee to be paid out of the 20*l.* in Court, but not to exceed it."

WILLS, J., concurred.

*Order accordingly.*

Solicitors : *Mole & Stone*, for the bankrupts.

*Beale & Co.*, for the trustee.

*Watson & Wadsworth*, for the Nottingham Bank.

*J. & W. Maude*, for Drury Lowe.

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Cases relied upon or referred to :—

*In re Clarkson, Ex parte Allestree.* See *ante*, Volume II., page 219.

*In re Salaman, Ex parte Salaman.* See *ante*, Volume II., page 61 ; L. R. 14 Q. B. D. 936.

## PRACTICE.

DIVISIONAL  
COURT.

BEFORE  
CAVE, J.,  
and  
WILLS, J.

1886.  
Dec. 6th.

IN RE HANN, EX PARTE FOREMAN.

*Bankruptcy Rules, 1883, Rule 111 (2).*

*Preliminary Objection—Money's worth in Dispute under 50l.—No Leave to Appeal obtained—Ultra Vires—Costs.*

Upon an appeal from a County Court, the preliminary objection was taken that the money or money's worth involved did not amount to 50*l.*, and that no leave to appeal had been obtained.

Against this objection it was argued that Rule 111 (2) of the Bankruptcy Rules, 1883, by which the said limitation is made, was *ultra vires*.

*Held* : That the language of the Bankruptcy Act was clear with reference to the power to make rules, subject to the proviso that such rules shall not extend the jurisdiction of the Court : that the said Rule 111, regulating appeals, was not *ultra vires* : and that the appeal must be dismissed with costs.

THIS was an appeal on behalf of the trustee in the bankruptcy against a decision of the learned judge of the Windsor County Court refusing to declare a certain payment of 37*l.* made by the bankrupt to be a fraudulent preference.

*Edward Clayton* : for the trustee in the bankruptcy.

*Eve* : for the respondent.

I have a preliminary objection. The amount here is 37*l.* No leave to appeal has been obtained. Rule 111 of the Bankruptcy Rules, 1883, provides : “(1) Except by leave of the Court there

shall be no appeal to the Court of Appeal from any order made by consent, or as to costs only. (2) No appeal to the Court of Appeal shall be brought from any order relating to property when it is apparent from the proceedings that the money or money's worth involved does not exceed 50*l.*, unless by leave of the Court." This appeal ought not to be heard, for the amount is only 37*l.*, and no leave has been obtained.

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*Edward Clayton :*

My contention is that Rule 111 (2) is *ultra vires*. By section 104, sub-section (2) of the Bankruptcy Act, 1883, "Orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal as follows \* \* \*" There is no power to make rules unless under the Act. By section 127 (1), "The Lord Chancellor may from time to time, with the concurrence of the President of the Board of Trade, make, revoke, and alter general rules for carrying into effect the objects of this Act." The object of the Act was to give any aggrieved person a right of appeal. The rules referred to were intended to be rules regulating the form of appeals, and the process of appealing, and it was not intended that by such rules the power of appealing from an order should be taken away from an aggrieved person. The rules might order as to the time and manner in which an appeal should be brought, but they have no right to make any restriction as to amount. If the limit is 50*l.*, it might be 10,000*l.* It is recognised that there is a point at which rules may override an Act. In the case of *Reed v. Harvey* (L. R. 5 Q. B. D. 184), which was a case in which one of the Bankruptcy Rules, 1871, was under consideration, Mr. Justice LUSH said, in the course of his judgment, "We cannot think that the rule is intended to do more than to regulate the conduct of the trustee as between him and the Court. If it had in terms gone further, we should have been prepared to hold that it was *ultra vires*, being inconsistent with the enactment of the statute itself. The power to make rules is a power given in order to carry into effect the enactments of the statute \* \* \*." The rules cannot control or supersede the Act, but must be made for carrying out the objects of the Act.

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An aggrieved person cannot be restricted from appeal because the amount happens to be within 50*l*.

CAVE, J. :

Judgment.

I am of opinion that the point raised cannot prevail. The language of the Act is clear with reference to the power to make rules. Section 104 contains the remarkable provision, "(d) No appeal shall be entertained except in conformity with such general rules as may for the time being be in force in relation to the appeal." That is a remarkable section, which indicates that rules may be made which will prevent an appeal being made. Now we turn to section 127, which says, "(1) The Lord Chancellor may from time to time, with the concurrence of the President of the Board of Trade, make, revoke, and alter general rules for carrying into effect the objects of this Act. (2) All general rules made under the foregoing provisions of this section shall be laid before Parliament within three weeks after they are made, if Parliament is then sitting; and if Parliament is not then sitting, within three weeks after the beginning of the then next session of Parliament, and shall be judicially noticed, and shall have effect as if enacted by this Act." That is also a remarkable provision. There is given to the rules the same effect as is given to the Act. Then in sub-section (4) of section 127 there is this: "Provided always, that the said general rules so made, revoked, or altered, shall not extend the jurisdiction of the Court." But nothing is said as to limiting or restricting it. Now Rule 111 provides, "(1) Except by leave of the Court there shall be no appeal to the Court of Appeal from any order made by consent, or as to costs only. (2) No appeal to the Court of Appeal shall be brought from any order relating to property when it is apparent from the proceedings that the money or money's worth involved does not exceed 50*l*., unless by leave of the Court." If one part of that rule is *ultra vires*, the whole of it is, and so in that case, if a question should arise as to costs to the extent of even half-a-crown, there might be an appeal as to that. It is impossible that the legislature intended an absolute right of appeal in all cases. The legislature is merely laying down the general nature of appeals, how the appeal is to be brought being regulated by rules, and those rules are



subject to the qualification that they shall not extend the jurisdiction of the Court. The case of *Reed v. Harvey* (L. R. 5 Q. B. D. 184) has been cited, but what was read was only a dictum where it was said that the Court would have been prepared to hold that the rule there was *ultra vires* if it enacted something contrary to the legislature, as being inconsistent with the enactment of the statute itself. Here the rule has not enacted anything contrary to the legislature, and I am of opinion it was intended that the right of appeal should be limited by general rules. The appeal must be dismissed with costs.

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WILLS, J. :

I am of the same opinion.

*Appeal dismissed with costs.*

*Edward Clayton :*

I presume the trustee may take the costs out of the estate.

CAVE, J. :

I am of opinion that the trustee in this case ought to pay the costs personally. He has put the estate to quite unnecessary expense.

WILLS, J., concurred.

*Order accordingly. Leave to appeal being refused. Leave to appeal was, however, subsequently granted by the Court of Appeal on application to that Court.*

Solicitors : *Thomson & Ward*, for the trustee in the bankruptcy.  
*Chapman*, for the respondent.

Case relied on :

*Reed v. Harvey*, L. R. 5 Q. B. D. 184.

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## PRACTICE.

## IN RE BARLOW, EX PARTE THORNBUR.

COURT OF  
APPEAL.BEFORE THE  
MASTER OF  
THE ROLLS,  
LINDLEY, L.J.,  
LOPES, L.J.  
1886.

Dec. 17th.

*Bankruptcy Act, 1883, section 28.**Composition or Scheme of Arrangement—Refusal to Approve—Discretion of Registrar—Rash and Hazardous Speculations—Gambling, Betting, and Stock Exchange Transactions.*

*Held:* (1) That the term "rash and hazardous speculations" in section 28, sub-section 3 (d), of the Bankruptcy Act, 1883, is not confined to rash and hazardous speculations in trade; but the term also includes other speculations of a rash and hazardous nature, such as gambling, betting, and Stock Exchange transactions.

(2) That on the question of granting or refusing the approval of the Court to a composition or scheme of arrangement, the registrar must not take a one-sided view, but look at all the circumstances. He must consider on the one side the conduct of the debtor, and on the other the interests of the creditors, and he must exercise his discretion both with regard to his duty to the public on the one hand, and his duty to the creditors on the other. The registrar must consider all the circumstances, and exercise his discretion thereon.

THIS was an appeal on behalf of the debtor *Barlow*, and also on behalf of one *J. H. Thornber*, the petitioning creditor, against an order of the Divisional Court sitting in Bankruptcy, affirming an order of the learned judge of the Croydon County Court, by which he refused to approve a composition which had been put forward by the debtor and accepted by the creditors, whereby the said debtor proposed to pay 2s. in the pound.

Section 18 of the Bankruptcy Act, 1883, which deals with compositions or schemes of arrangement, provides, by sub-section (6), "If the Court is of opinion that the terms of the composition or scheme are not reasonable, or are not calculated to benefit the general body of creditors, or in any case in which the Court is required under this Act where the debtor is adjudged bankrupt, to refuse his discharge, the Court shall, or if any such facts are proved as would, under this Act, justify the Court in refusing, qualifying, or suspending the debtor's discharge, the Court may in its

discretion refuse to approve the composition or scheme." Section 28 of the Act relates to the question of a bankrupt's discharge, and amongst the facts in sub-section (3) of that section, which will justify the Court in refusing, qualifying, or suspending a debtor's discharge, are: "(d) That the bankrupt has brought on his bankruptcy by rash and hazardous speculations or unjustifiable extravagance in living."

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In the present case the debtor, *Barlow*, was a young man twenty-six years of age, and of no occupation, his only income being the sum of 300*l.*, which was allowed him by his father. His wife, from whom he was now separated, had 3,000*l.* a year, which however was settled on herself.

For some time he had been engaged in gambling, betting, and Stock Exchange transactions, by which it was alleged that within the period of a very few years he had got through something like 8,000*l.*

On July 25th, 1885, he went to America, and on September 25th a petition was presented against him.

The liabilities amounted to 8,078*l.*, with assets nil.

A proposal was however made by the debtor to pay a composition of 2*s.* in the pound, which was accepted by the creditors.

On application to the County Court to approve the proposed composition, the report of the official receiver, under section 18, sub-section (5), was read, in which he stated that the debtor had, in his opinion, contracted debts without having any reasonable ground of expectation of being able to pay them, and had brought on his insolvency by gambling, betting, and Stock Exchange transactions.

Under these circumstances the learned County Court Judge refused to give the sanction of the Court, stating in his judgment that the debtor had been clearly guilty of rash and hazardous speculations, and unjustifiable extravagance in living.

From this refusal the debtor, and Mr. *Thornber*, the petitioning creditor, appealed to the Divisional Court sitting in Bankruptcy, by which the decision of the County Court Judge was affirmed.

An appeal was now brought to the Court of Appeal.

*Gully*, Q.C. (*Sidney Woolf* with him): for the appellants.

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This is a joint appeal of the bankrupt and the petitioning creditor. The County Court Judge had no right to refuse to sanction this composition. The debtor denied on affidavit any extravagance in living, and says he has not engaged in any Stock Exchange transactions since 1883. The County Court Judge admits that the offer made by the debtor is beneficial, because 2s. in the pound is offered, and the assets are nil. But he went on to say that by the Act the Court is bound to take notice in the public interest of what has occurred in a case, and it ought to prevent a man who has been reckless from trading again, and in such case to put a mark of bankruptcy upon him. The gambling transactions of the bankrupt came, in his opinion, under the head of rash and hazardous speculations, or unjustifiable extravagance in living, and he refused to approve the composition. In so deciding, the County Court Judge took a wrong view of the manner in which the discretion should now be exercised under the section. All the creditors accepted the composition, and the Judge ought to consider the interests of the creditors.

[THE MASTER OF THE ROLLS.—The Court will not approve a composition at the wish of the creditors if there have been bad breaches under section 28. The Court will not be bound by the creditors.]

The interests of the creditors must be considered.

[THE MASTER OF THE ROLLS.—Of course they must be considered, but if it is plain that the bankrupt has misconducted himself, and badly, the Court must deal with it.]

The Court ought not to punish the creditors by refusing to approve on account of offences under section 28, sub-section (3).

[THE MASTER OF THE ROLLS.—The Court must consider all matters. As I said recently in the case of *In re Genese, Ex parte Kearsley & Co.* (see *ante*, p. 274), the Court ought to look at both sides. So far as the effect of approving a composition or scheme will be to release the debtor from liability, his conduct ought to be

very carefully examined ; but the Court must also have regard to the creditors, and if the composition or scheme is clearly the best thing for them, the Court must have due regard for that. It is a matter of discretion, and the Court of Appeal will not interfere unless it is clear the discretion is wrong. The Court must take all matters into consideration.]

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Then I say that the conduct of the debtor here does not amount to rash and hazardous speculations, or unjustifiable extravagance in living.

[LOPES, L.J.—Why, is not betting a hazardous speculation ? I should have thought it essentially so.]

The section means rash and hazardous speculations which result in legal debts. What is meant is, speculations in the course of trade. These were mere betting transactions.

THE MASTER OF THE ROLLS (LORD ESHER) :

In this case a young gentleman without a shilling in the world, Judgment. with an allowance of 800*l.* from his father, which the father could withdraw at any time, married a lady with a large income—8,000*l.* a year, it is said—but that income was settled on herself. Therefore this young man had a casual allowance from his father, and nothing from his wife. He is without anything on which any creditor could come. That is his position. This young man persuades his wife to let him receive her income, and he spends the whole of it on his own profligate amusements. He spends the whole of it and more. He goes to races ; he frequents gambling houses ; he loses it at cards and betting. The 8,000*l.* and the 800*l.* are not enough for him, and he borrows money. He runs into debt to the extent of 8,000*l.* His wife naturally leaves him. Then this man without a sixpence offers a composition of 2*s.* in the pound. Where is that to come from ? It is to come from his father. Well, the County Court Judge had to consider this matter, and he was of opinion that this young man had brought on his bankruptcy by rash and hazardous speculations, and by unjustifiable extravagance in living. This young man, be it remembered,

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who was without a sixpence, and who had spent his time in gambling and horse racing. It has been argued that what he did does not amount to rash and hazardous speculations, and that we were bound in law to say that it was not rash and hazardous speculations, and that the section only applies to rash and hazardous speculations in trade. As to that argument, I put this question to Mr. *Gully*, "What about speculations on the Stock Exchange; that is not trade; if they were rash and hazardous would they be within the section?" and he was fain to confess that they would. Then I put this question—"If a man goes to a regular gambling place like Monte Carlo, and puts down money night after night and loses, is that rash and hazardous speculation?" and after consideration Mr. *Gully* thought it might be. Then how should going on the turf and betting on horses, of which the man knows nothing whatever, be different. Why we should be asked to say that rash and hazardous speculations in the Act is confined to trade when the Bankruptcy Act has brought within its purview all persons, and not traders only, I cannot conceive. The Act embraces all persons, and I do not doubt that this man brought on his bankruptcy by rash and hazardous speculations—those rash and hazardous speculations being betting. He has also in my opinion brought on his bankruptcy by unjustifiable extravagance in living. He has nothing: he has frequented gambling houses; his extravagance in living has been most unjustifiable, and he is also guilty under that. His debts amount to 8,000*l.*; and there are no assets. By means of his father, he offers 2*s.* in the pound. Of course that is for the benefit of the creditors—1*s.* would be—and the creditors naturally agree to accept it. The Court in a case of this kind has to consider both sides, and to exercise its discretion, knowing what its duty is to the public. The judge, taking all things together, has to say, "Ought I to agree to this composition, or ought I not?" In this case the County Court Judge thought he ought not to approve it, and we ought not to overrule his decision unless we are quite sure he exercised his discretion wrongly. See what a strong case this is! The County Court Judge thought that this composition should not be approved. The Divisional Court in Bankruptcy were of the same opinion. I also think that they were clearly right, and that

it would have been a dereliction of duty on the part of the County Court Judge if, in this case, upon the balance, he had come to any other decision. I do not say this because only 2s. in the pound had been offered. If 3s. or even more was attempted to be squeezed out of the father, I should say exactly the same. The appeal must therefore be dismissed.

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LINDLEY, L.J. :

When leave to appeal was granted by us in this case we were certainly under the impression that some point of law had to be decided. There is nothing of the kind. Section 28 applies to all bankruptcies, whether traders or not. In considering the question of approving a composition or scheme the registrar must not take a one-sided view, but look at all the facts. He must consider the conduct of the debtor and the interests of the creditors, and decide accordingly. In this case I am clearly of opinion that the bankrupt has brought on his bankruptcy both by rash and hazardous speculations and unjustifiable extravagance in living, and that the refusal of the County Court Judge to approve this composition was quite right.

LOPES, L.J. :

The registrar has to consider on the one side the conduct of the debtor, and on the other the interests of the creditors. He has to consider both, and he must exercise his discretion both in regard to his duty to the public on the one hand, and his duty to the creditors on the other. He must consider all the circumstances. In the present case the County Court Judge was clearly right.

*Appeal dismissed.*

Solicitor : *H. Montagu*, for the appellants.







## DIGEST OF CASES REPORTED IN THIS VOLUME.

ABUSE OF PROCESS.]—*Held* : That the Court will not allow its process to be used to do indirectly that which the process of the Court will not allow to be done directly.

Thus where application was made by a friendly creditor for discovery of documents, nominally for the purpose of carrying out proceedings to expunge a proof, but in reality for the purpose of reopening, after time for appeal had elapsed, the question as to whether the receiving order had been properly made against the bankrupt or not.

*Held* : That the application was an attempt by the contrivance of the creditor and the bankrupt, in the interest of the bankrupt, to use the process of the Court to do that which if the bankrupt himself asked the Court, the Court would not allow to be done : and that the registrar was quite right in refusing it. *In re Dashwood, Ex parte Kirk* . . . . . p. 257

AGISTMENT.]—Where a cattle dealer placed certain stock on the lands of a farmer upon an agreement whereby such stock remained the property of the dealer, who at the end of the fixed period was to sell the stock, and, after deducting the original price together with a percentage for profit, was to hand over the balance to the farmer : and during the continuance of the agreement the farmer became bankrupt, whereupon the trustee in the bankruptcy claimed the stock in question as being in the reputed ownership of the bankrupt within section 44, sub-section (iii.), of the Bankruptcy Act, 1883.

*Held* : That the custom of agistment was notorious and one which the ordinary creditors of the bankrupt might reasonably be presumed to have known : and that such being the case no reputation of ownership could arise with respect to the stock upon the lands of a farmer. *In re Woodward, Ex parte Huggins* . . . . . p. 75

ALLOWANCE.]—*Held* : That a compassionate allowance granted to a retired Indian officer by the Secretary of State for India under the powers conferred on him by the Government of India Act, 1858—which said allowance is not provided for in the regulations of the service, and the granting of it does not form one of the terms upon which the service was originally entered upon, but is a mere act of grace—does not fall within the words of section 53, sub-section (2) of the Bankruptcy Act, 1883, and the Court will not make an order under that section directing a certain sum to be paid thereout to the trustee in the bankruptcy of such officer for the purpose of distribution amongst his creditors. In order that section 53 may apply, the payment must be one to which the bankrupt has a legal or equitable claim. *In re Webber, Ex parte Webber* . p. 288

AMENDMENT OF PROOF.]—See *Proof*.

APPEAL.]—(1) *Held*: That although the time allowed for appeal in bankruptcy matters may be extended by the Court, yet some ground must always be shown why this should be done, and notwithstanding the fact that when a *bond fide* mistake has been committed in the estimation of a proof the trustee in the bankruptcy ought not to be permitted to take a technical advantage of such mistake, where a creditor for more than a year and a half took no steps to reverse the decision of the County Court Judge refusing to allow such creditor to amend or withdraw his proof alleged to be so wrongly estimated, the Court could not permit him to reopen the case for the purpose of setting aside that decision. *In re Tricks, Ex parte Charles* . . . . . p. 15

(2) *Held*: That an appeal lies direct to the Court of Appeal from the decision of the Judge in Bankruptcy upon a Special Case stated under section 97, subsection (3), of the Bankruptcy Act, 1883, by the Judge of a County Court for the opinion of the High Court. *In re Moon, Ex parte Dawes* . . . p. 105

(3) The Judge of a County Court not having jurisdiction in bankruptcy made an order of committal against the appellant upon a judgment summons under section 5 of the Debtors Act, 1869.

The judgment summons having by mistake been marked with the words "In bankruptcy," an appeal was brought to this Divisional Court.

*Held*: That no appeal could lie from the order complained of, at any rate to the Divisional Court in Bankruptcy.

*Quære*: Whether any appeal lies from a committal in the County Court under section 5. *In re Watkins, Ex parte Watkins* . . . . . p. 146

(4) Where on an appeal from the rejection of a proof by the trustee the objection is taken that such rejection was not made within the fourteen days required by Rule 173 of the Bankruptcy Rules, 1883, the Court will allow such objection, but will treat the application as a motion to expunge the proof on behalf of the trustee, and will deal with the case accordingly.

The case of *In re Sissling, Ex parte Fenton* (see *ante*, Volume II., page 289), followed. *In re Voght, Ex parte Spamer* . . . . . p. 164

(5) Where, in a case of any legal difficulty, a trustee in a bankruptcy has obtained the decision of the Court, if such trustee appeals from the decision given and does not succeed, the order for costs will be made against him personally.

A trustee, therefore, before appealing from such decision ought to obtain the consent of the creditors to do so, and also to obtain a guarantee from such creditors for his own protection in the event of the appeal being decided against him. *In re Malden, Gibson & Co., Ex parte James* . . . . . p. 185

(6) (*Per Lord ESHER*): That the jurisdiction of refusing or permitting an appeal is a very delicate jurisdiction, but where a question is one of principle and has been decided for the first time, it is not a sufficient reason for refusing leave to appeal because a judge is himself of opinion that he has given a right decision. *In re Armstrong, Ex parte Armstrong* . . . . . p. 193

(7) *Held*: That an unpaid creditor is a "person aggrieved" within the meaning of section 104, sub-section (2) of the Bankruptcy Act, 1883, by the granting of an order of discharge to a bankrupt, and as such has a right of appeal against such order. *In re Payne, Ex parte Castle Mail Packet Company*. . . . . p. 270

(8) Upon an appeal from a County Court the preliminary objection was taken that the money or money's worth involved did not amount to 50*l.*, and that no leave to appeal had been obtained.

Against this objection it was argued that Rule 111 (2) of the Bankruptcy Rules, 1883, by which the said limitation is made, was *ultrâ vires*.

*Held*: That the language of the Bankruptcy Act was clear with reference to the power to make rules subject to the proviso that such rules shall not extend the jurisdiction of the Court: that the said Rule 111 regulating appeals was not *ultrâ vires*: and that the appeal must be dismissed with costs. *In re Hann, Ex parte Foreman*. . . . . p. 300

**ARRANGEMENT.]—See *Scheme of Arrangement*.**

**ASSIGNEE—Of Judgment Debt.]—Held**: That the assignee of a judgment debt is not "a creditor" who "has obtained a final judgment" against the judgment debtor within the meaning of section 4, sub-section 1 (g), of the Bankruptcy Act, 1883: and that such assignee is not entitled to issue a bankruptcy notice against the debtor in respect of the debt.

That the words of the said sub-section cannot be extended further than to the personal representative of the creditor who has obtained the judgment; and that the decision of the Court of Appeal in the case of *In re Woodall, Ex parte Woodall* (see *ante*, Volume I., page 201; L. R. 13 Q. B. D. 479), did not go further than to such personal representative. *In re Keeling, Ex parte Blanchett*, p. 157.

*Of Lease.]—The assignee of a lease of certain premises having become bankrupt and rent being in arrear judgment for the same was recovered against his assignor who was under covenant to pay such rent.*

The assignor thereupon proved against the estate of the bankrupt for the amount so paid; and also sought to prove in respect of his contingent liability for the rent during the time the said lease had yet to run.

The last-mentioned proof was rejected by the trustee in the bankruptcy.

*Held*: That the proof must be admitted: and that an estimate must be made by the trustee in the bankruptcy of the value of the liability under section 37, sub-section (4), of the Bankruptcy Act, 1883. *In re Hinks, Ex parte Verdi*. . . . . p. 218

**ATTACHMENT.]—Where a judgment creditor obtained a garnishee order in respect of a debt due to the judgment debtor, and a dispute having arisen, payment into Court of the debt to abide further order was directed, and the judgment debtor subsequently became bankrupt.**

*Held*: That such payment into Court to abide further order did not constitute

a "receipt of the debt" by which an attachment is completed within section 45, sub-section (2) of the Bankruptcy Act, 1883.

That the meaning and intention of the legislature by the Bankruptcy Act, 1883, was to get rid of all questions which might have arisen before that Act was passed, and to put the law upon a very simple and plain foundation : and that a judgment creditor having attached a debt does not become entitled to retain it unless he has received the debt before the bankruptcy. *Butler v. Wearing* . . . . . p. 5

"BALANCE ORDER."—*Held* : That a "balance order" for the payment of calls upon shares, made on a contributory in the winding-up of a company, is not a "final judgment" within the meaning of section 4, sub-section 1 (g), of the Bankruptcy Act, 1883, so as to enable the liquidator of the company to issue a bankruptcy notice against the contributory in respect of the amount ordered by the balance order to be paid.

The case of *In re Sanders, Ex parte Whinney* (see *ante*, Volume I., page 185 ; L. R. 13 Q. B. D. 476), approved and followed. *In re Tennant, Ex parte Grimvade* . . . . . p. 166

**BANKRUPTCY NOTICE.**—(1) *Held* : That the assignee of a judgment debt is not "a creditor" who "has obtained a final judgment" against the judgment debtor within the meaning of section 4, sub-section 1 (g), of the Bankruptcy Act, 1883 : and that such assignee is not entitled to issue a bankruptcy notice against the debtor in respect of the debt.

That the words of the said sub-section cannot be extended further than to the personal representative of the creditor who has obtained the judgment : and that the decision of the Court of Appeal in the case of *In re Woodall, Ex parte Woodall* (see *ante*, Volume I., page 201 ; L. R. 13 Q. B. D. 479), did not go further than to such personal representative. *In re Keeling, Ex parte Blanchett* . . . . . p. 157

(2) *Held* : That a creditor who has obtained a final judgment cannot under section 4, sub-section 1 (g), of the Bankruptcy Act, 1883, issue a bankruptcy notice against the judgment debtor, unless such creditor is also in a position to issue immediate execution on the judgment.

Thus, where final judgment is obtained against a firm, a bankruptcy notice cannot be issued against a member of such firm who has not been served with the writ, and has not appeared, or admitted that he is or has been adjudged to be a partner, unless under Order XLII., Rule 10, of the Rules of the Supreme Court, 1883, leave to issue execution against such partner has been obtained. *In re Ide, Ex parte Ide* . . . . . p. 239

(3) On August 23rd, 1886, judgment was recovered against the debtor, and execution was issued under which the sheriff levied on August 26th.

On September 1st, a third person having claimed the goods, an interpleader order was obtained by the sheriff under which the claimant paid 120*l.* into Court, and thereupon in pursuance of the order the sheriff withdrew from possession.

On September 20th the issue in the interpleader was settled, but on September 27th, before such issue was decided, the judgment creditor served on the debtor a bankruptcy notice under section 4, sub-section 1 (g), of the Bankruptcy Act, 1883.

On an appeal from the decision of the County Court Registrar refusing to set aside the notice.

*Held* : That when the interpleader order was made, and an issue directed, it was in substance a stay of execution until such issue in the interpleader was decided : and that the creditor not being in a position to issue execution on the judgment was not entitled to serve a bankruptcy notice on the debtor at the date when such notice was served. *In re Ford, Ex parte Ford* . . . p. 283

BETTING.]—See *Speculation*.

BILL OF SALE.]—(1) *Held* : That although it is from its nature impossible that a licence to take immediate possession of goods as a security for a debt, which is a bill of sale within the Bills of Sale Acts, 1878 and 1882, should be made in the form given in the schedule to the Act of 1882, such a licence is void under section 9 of that Act as between grantor and grantee, the object of the Act being to make void every bill of sale given to secure the payment of money by the grantor unless it is made substantially in accordance with the form given in the schedule.

The *ratio decidendi* in the cases of *In re Hall, Ex parte Close* (L. R. 14 Q. B. D. 386), and *In re Cunningham & Co., Attenborough's Case* (L. R. 28 Ch. D. 682), disapproved. *In re Townsend, Ex parte Parsons* . . . p. 36

(2) *Held* : That a bill of sale is not void under the Bills of Sale Act, 1882, although it may omit to specify the *locus* or place at which the goods assigned are situate. *In re Lane, Ex parte Hill* . . . p. 148

(3) *Held* : That where a transaction is one of pawn or pledge, by which goods are deposited by the pledgor with the pledgee as security for the payment of money then advanced by the pledgee to the pledgor, such transaction is not within the Bills of Sale Acts ; and a document signed at the time by the pledgor, recording the transaction and regulating the rights of the pledgee as to the sale of the goods, is not a bill of sale within the meaning of the said Acts.

That the effect of the decision in the case of *In re Townsend, Ex parte Parsons* (see *ante*, page 36 : L. R. 16 Q. B. D. 532) was to determine that an authority to take possession of goods as security for the payment of money is not exempted from the Bills of Sale Acts because it is an authority to take immediate possession : and that a transaction which is contrary to the Bills of Sale Acts is not taken out of the operation of such Acts because from its nature such transaction cannot be expressed in the statutory form of a bill of sale. *In re Hardwick, Ex parte Hubbard* . . . p. 246

BOARD OF TRADE.]—See *Official Receiver*.

"BOOKS OF ACCOUNT."—*Held*: That letters, cheque-books and other general documents are not "books of accounts" within the meaning of Rule 259 of the Bankruptcy Rules, 1883, which can be claimed by the trustee in a bankruptcy, even though from such documents an account might be made up. *In re Winslow, Ex parte the Trustee* . . . . . p. 60

CHARGING ORDER.]—*Held*: That a charging order upon shares, made under the Statute 1 & 2 Vict. c. 110, s. 14, does not fall within section 45 of the Bankruptcy Act, 1883, and that the words in the said section, "an execution against the goods of a debtor," which is to be completed by seizure and sale, do not include such an order. *In re Hutchinson, Ex parte Plowden & Co.* . . . . . p. 19

"CHOSE IN ACTION."—*Held*: That shares in a railway company are "things in action" within the meaning of section 44, sub-section (iii.) of the Bankruptcy Act, 1883, so as to be excepted from the doctrine of reputed ownership.

Where a partner in a stockbroking firm purchased shares in a railway company with money of the firm, and subsequently deposited the share certificates with the firm's bankers as security or cover for advances made by them to the firm, and before notice of the deposit had been given to the railway company, the firm, and also the members of it were adjudicated bankrupts.

*Held*: That the trustee in the bankruptcy was not entitled to such shares as being in the reputed ownership of the bankrupts within section 44, sub-section (iii.) of the Bankruptcy Act.

*Quære*: Whether the term "choses in action" does not now include all personal chattels not in possession.

The decision in *Colonial Bank v. Whinney* (see *ante*, Volume II., page 234) reversed. *Colonial Bank v. Whinney* . . . . . p. 207

CLAIM—*Arising out of Bankruptcy.*]—On June 8th, 1885, the manager of the debtor, without his knowledge, communicated to a firm of corn-factors, to whom the debtor was indebted for wheat then in his stores, the fact that the debtor was in difficulties, and the firm thereupon bought from the manager all the wheat in the debtor's stores on the usual credit terms.

On the same day the debtor sent out by post from another place notices of suspension of payment, which were delivered on the following morning to the creditors and also to the debtor's manager.

On the facts of the sale of the wheat coming to the knowledge of the debtor he repudiated the transaction, and it was subsequently set aside by the County Court Judge.

At the hearing it was objected that the claim did not arise out of the bankruptcy, and as the amount in dispute exceeded 200*l.*, and all parties did not consent, the County Court had no jurisdiction.

*Held* (on Appeal): That the claim did arise out of the bankruptcy: that but for the impending bankruptcy the transaction would never have taken place, and but for the actual bankruptcy it would never have been disputed: and that the decision of the County Court Judge was right. *In re Hawke, Ex parte Scott & Smith* . . . . . p. 1

**COMMITTAL, ORDER OF.]—**(1) The Judge of a County Court not having jurisdiction in bankruptcy made an order of committal against the appellant upon a judgment summons under section 5 of the Debtors Act, 1869.

The judgment summons having by mistake been marked with the words "In bankruptcy," an appeal was brought to this Divisional Court.

*Held:* That no appeal could lie from the order complained of, at any rate to the Divisional Court in Bankruptcy.

*Quære:* Whether any appeal lies from a committal in the County Court under section 5. *In re Watkins, Ex parte Watkins* . . . . . p. 146

(2) *Held:* That the Court has jurisdiction to make a receiving order, in lieu of a committal, against a judgment debtor, under section 103, sub-section (5) of the Bankruptcy Act, 1883, only on the application of a person who is strictly speaking a "judgment creditor."

Such receiving order cannot be made, therefore, on the application of every person who is entitled to apply to the Court under section 5 of the Debtors Act, 1869.

That where an order is made in the Divorce Court directing the co-respondent to pay to the husband, the petitioner in the suit, the amount given as damages forthwith for the purpose of settlement on the children of the marriage, such husband is not a "judgment creditor" of the co-respondent within the meaning of section 103, sub-section (5), of the Bankruptcy Act.

That where a judgment debtor makes default in payment of the judgment debt, the Court has power of committal under section 5 of the Debtors Act, 1869, if proof is given that such debtor has had the means of paying part of the said debt even though he has not had the means of paying the whole amount. *In re Fryer, Ex parte Fryer* . . . . . p. 231

**COMPOSITION.]—**See also *Scheme of Arrangement*.

(1) The proposal put forward by a debtor provided, that all the property of such debtor divisible among his creditors should vest in a trustee, and, subject to the provisions of the scheme, be administered according to the law of bankruptcy: that, in addition, the sum of 100*l.* a year out of a pension of 297*l.* belonging to the debtor should be paid to the trustee under the scheme until, with the rest of the debtor's property, all the costs relating to the bankruptcy should have been paid, and the creditors should have received 15*s.* in the pound upon the amount of their debts: that after payment of 15*s.* in the pound to the creditors upon their debts and of all the costs, charges, and expenses, the trustee should hand over to the debtor the surplus of the estate: and that as from the date of the confirmation of the scheme by the Court the debtor should be released and discharged from all debts provable under the bankruptcy.

On the debtor applying to the Court for its approval, the Registrar was in doubt whether such proposal required to be stamped as a composition or a scheme of arrangement, and the question was referred to the Judge for decision.

*Held:* That the arrangement in question had more of the elements of a scheme than of a composition: and that the fee must be paid on the estimated value of the 100*l.* a year as an asset. *In re Griffith* . . . . . p. 111

(2) Where on application to the Court to approve a composition the official

receiver reported that he had a sufficient sum in his hands for payment thereof, such report being founded on the estimate given by the debtor in his statement of affairs, which subsequently proved to be wrong, and an order was in consequence asked for against the official receiver personally to make up the required sum.

*Held:* That the applicants were not entitled to an order against the official receiver personally.

That if a debtor thus forms a wrong estimate of his position, unless the amount found to be necessary to pay the composition agreed upon is procured, the proper order for the Court to make is one adjudging such debtor bankrupt and annulling the composition under section 18, sub-section (11), of the Bankruptcy Act, 1883. *In re Webster, Ex parte Foster & Co.* . . . p. 132

(3) *Held:* That where the creditors of a bankrupt after adjudication by special resolution resolve under section 23 of the Bankruptcy Act, 1883, to entertain a proposal for a composition or scheme of arrangement of the bankrupt's affairs, such special resolution must be confirmed at a second meeting of the creditors in the same manner as a special resolution under section 18 of the Act, resolving before adjudication to entertain a like proposal.

Where application is made to the Court for approval of a composition or scheme the registrar must exercise a judicial discretion on the whole case, and the Court of Appeal will not disapprove of his decision except on the clearest ground.

The registrar ought to look both at the interests of the creditors and the conduct of the debtor, and so far as the effects of the approval of the composition or scheme will be to release the debtor from liability, his conduct ought to be carefully examined: but regard must also be had for the interests of the creditors, and if the composition or scheme is clearly the best thing for the creditors the registrar ought to have due regard for that fact. The registrar must look closely into all the circumstances and exercise his discretion thereon. *In re Genese, Ex parte Kearsley & Co.* . . . p. 274

(4) *Held:* That the term "rash and hazardous speculations" in section 28, sub-section 3 (d) of the Bankruptcy Act, 1883, is not confined to rash and hazardous speculations in trade, but the term also includes other speculations of a rash and hazardous nature, such as gambling, betting, and Stock Exchange transactions.

On the question of granting or refusing the approval of the Court to a composition or scheme of arrangement the registrar must not take a one-sided view but look at all the circumstances. He must consider, on the one side, the conduct of the debtor, and on the other, the interests of the creditors, and he must exercise his discretion both in regard to his duty to the public on the one hand and his duty to the creditors on the other. The registrar must consider all the circumstances and exercise his discretion thereon. *In re Barlow, Ex parte Thorner* . . . p. 304

**COSTS.]**—The plaintiff in an action in the Queen's Bench Division of the High Court of Justice obtained an order against the defendant for the payment of certain costs.



Subsequently, on the application of the plaintiff, a judgment summons under the Debtors Act, 1869, was issued out of the Brentford County Court asking for an order for the payment by instalments of the sum due.

The County Court Judge refused to make the order, on the ground that he had no jurisdiction to interfere with the order of a Superior Court for payment of a larger sum.

*Held*: That the County Court, not being a Court within the London Bankruptcy District, had power to enforce such an order or judgment of the High Court by directing payment thereof by instalments.

But the County Court would have no power to vary or rescind an order made by the Superior Court for the payment by instalments of a judgment debt, as in such a case the Superior Court would have already dealt with the question of the debtor's means.

The case of *Washer v. Elliott* (1 C. P. D. 169; 45 L. J. C. P. 144; 34 L. T. 756; 24 W. R. 432) explained. *In re Ives, Ex parte Addington* . . . p. 83

*Of Official Receiver.*—*Held*: That when the official receiver has made his report upon a composition or scheme of arrangement his duty is complete, and, except under very particular circumstances, he should not appear on an appeal: that if the appearance of the official receiver is essential, the Court will allow the appeal to stand over for that purpose: and that unless his appearance is requisite no costs will be allowed to him. *In re Reed, Bowen & Co., Ex parte Reed, Bowen & Co.* . . . . . p. 90

*Of Trustee.*—(1) Where, in a case of any legal difficulty, a trustee in a bankruptcy has obtained the decision of the Court, if such trustee appeals from the decision given and does not succeed, the order for costs will be made against him personally.

A trustee, therefore, before appealing from such decision ought to obtain the consent of the creditors to do so, and also to obtain a guarantee from such creditors for his own protection in the event of the appeal being decided against him. *In re Malden, Gibson & Co., Ex parte James* . . . . . p. 185

(2) *Held*: That although by section 89, sub-section (1) of the Bankruptcy Act, 1883, a trustee shall, in the administration of the property of the bankrupt and in the distribution thereof amongst his creditors, have regard to any directions which may be given by the committee of inspection; nevertheless, if such trustee unreasonably and vexatiously rejects a proof of debt, the Court will order him to pay personally the costs occasioned by such rejection, even though in so doing he acted under the directions of the committee.

Where the view taken by a committee of inspection upon any question is frivolous and wasteful of the assets, the trustee is not justified in acting upon it, and cannot set up the directions of such committee as a defence against a personal order upon him to pay costs. *In re Smith, Ex parte Brown* . . . p. 202

(3) See also *In re Hann, Ex parte Foreman* . . . . . p. 300

*Against Undischarged Bankrupt.*—*Held*: That the Court has power to give costs against an undischarged bankrupt, and in a case in which it thinks right it will exercise that power. *In re Payne, Ex parte Castle Mail Packet Company* . . . . . p. 270

**COUNTY COURT.—Power of.**—(1) The plaintiff in an action in the Queen's Bench Division of the High Court of Justice obtained an order against the defendant for the payment of certain costs.

Subsequently, on the application of the plaintiff, a judgment summons under the Debtors Act, 1869, was issued out of the Brentford County Court asking for an order for the payment by instalments of the sum due.

The County Court Judge refused to make the order, on the ground that he had no jurisdiction to interfere with the order of a Superior Court for payment of a larger sum.

*Held*: That the County Court, not being a Court within the London Bankruptcy District, had power to enforce such an order or judgment of the High Court by directing payment thereof by instalments.

But the County Court would have no power to vary or rescind an order made by the Superior Court for the payment by instalments of a judgment debt, as in such a case the Superior Court would have already dealt with the question of the debtor's means.

The case of *Washer v. Elliott* (1 C. P. D. 169; 45 L. J. C. P. 144; 34 L. T. 756; 24 W. R. 432) explained. *In re Ives, Ex parte Addington* . . . p. 83

(2) See also *In re Wise, Ex parte Rowland* . . . . . p. 174

**CUSTOM.**—See *Reputed Ownership*.

**DEATH—Of debtor.**—Where a debtor died two days after presenting his petition in the County Court, and at the subsequent first meeting of the creditors resolutions were passed that the proceedings be continued and the estate administered by a trustee as if such debtor were alive and had been adjudicated bankrupt, but the County Court Judge declined to confirm such resolutions, and stated a case for the opinion of the High Court.

*Held*: That the intention of the Legislature in framing section 108 of the Bankruptcy Act, 1883, which provides for the continuance of proceedings on the death of a debtor by or against whom a bankruptcy petition has been presented, was to meet a case of this nature: and that the proper course for the Court to pursue, in the absence of any arrangement on the part of the representatives of the deceased debtor, was to make an order of adjudication against him and allow the matter to proceed in the ordinary way. *In re Walker*. p. 69

**DEBTORS ACT, 1869.**—(1) *Held*: That a trustee ought not to reject a proof tendered in respect of a debt, for which a judgment by consent has been obtained, merely on the ground that a copy not having been filed as required by section 27 of the Debtors Act, 1869 the judgment or any execution issued or taken out thereon is void; but in such case the trustee ought to investigate the validity of the alleged debt. *In re Smith, Ex parte Brown* . . . . . p. 202

(2) *Held*: That the Court has jurisdiction to make a receiving order, in lieu of a committal, against a judgment debtor, under section 103, sub-section (5)

of the Bankruptcy Act, 1883, only on the application of a person who is strictly speaking a "judgment creditor."

Such receiving order cannot be made, therefore, on the application of every person who is entitled to apply to the Court under section 5 of the Debtors Act, 1869.

That where a judgment debtor makes default in payment of the judgment debt, the Court has power of committal under section 5 of the Debtors Act, 1869, if proof is given that such debtor has had the means of paying part of the said debt even though he has not had the means of paying the whole amount. *In re Fryer, Ex parte Fryer* . . . . . p. 231

DEBTORS—*judgment-summons*.]—(1) See *In re Ives, Ex parte Addington* p. 83

(2) *In re Watkins, Ex parte Watkins* . p. 146

DELAY—*of creditor*.]—*Held*: That although the time allowed for appeal in bankruptcy matters may be extended by the Court, yet some ground must always be shown why this should be done, and notwithstanding the fact that when a *bond fide* mistake has been committed in the estimation of a proof the trustee in the bankruptcy ought not to be permitted to take a technical advantage of such mistake, where a creditor for more than a year and a half took no steps to reverse the decision of the County Court Judge refusing to allow such creditor to amend or withdraw his proof alleged to be so wrongly estimated, the Court could not permit him to reopen the case for the purpose of setting aside that decision. *In re Tricks, Ex parte Charles* . . . . . p. 15

*Of debtor in applying for discharge*.]—*Held*: That the fact that a bankrupt who, by his conduct, has brought himself within the quasi-penal provisions of section 28 of the Bankruptcy Act, 1883, abstains from applying for his discharge for a considerable time after he is entitled to do so, affords no ground for mitigation of the punishment proper to be imposed by the Court under that section by reason of such conduct. *In re Good* . . . . . p. 43

*Of petitioning creditor*.]—On February 19, 1885, a petition was presented against the debtor in the London Bankruptcy Court, but the hearing of such petition was subsequently adjourned from time to time with the consent of the petitioning creditor.

On January 5th, 1886, a receiving order was made on this petition in the High Court at 11.30 o'clock, and on the same day at 1 o'clock, a receiving order was also made against the debtor in the Swansea County Court at the instance of another creditor.

On an appeal by the creditor presenting the petition in London to set aside such order of the County Court.

*Held*: That from the evidence it appeared clear that the legitimate business of the debtor was carried on in Swansea, which was *prima facie* the place where his business transactions ought to be investigated: and that the petitioning creditor in London having for his own purposes delayed for several months

to proceed with his petition, the proper course for the Court to pursue was not to interfere with the order of the County Court, and application to be made to the London Court to stay the proceedings there. *In re Strick, Ex parte Martin* . . . . . p. 78

**DISCHARGE.**—(1) *Held* : That the fact that a bankrupt who, by his conduct, has brought himself within the quasi-penal provisions of section 28 of the Bankruptcy Act, 1883, abstains from applying for his discharge for a considerable time after he is entitled to do so, affords no ground for mitigation of the punishment proper to be imposed by the Court under that section by reason of such conduct. *In re Good* . . . . . p. 43

(2) *Held* : That in considering the question of a bankrupt's discharge the Court is bound to have regard not to the interests of such bankrupt or of the creditors alone, but also to the interests of the public and of commercial morality : and although facts may not be absolutely proved which would under section 28, sub-section (2), of the Bankruptcy Act, 1883, compel the Court to refuse any discharge, yet where gross misconduct within the said section is shown on the part of the bankrupt, the Court is perfectly justified in declining to grant a discharge upon conditions and in making an order absolutely refusing to such bankrupt any discharge at all. *In re Badcock, Ex parte Badcock* p. 138

(3) *Held* : That where all the facts have been brought to the notice of the Registrar, and he has exercised his discretion as to the terms on which a bankrupt should obtain his discharge, the Court of Appeal will not interfere with such decision on an allegation that the punishment imposed was too lenient and unless it is perfectly clear that the decision was wrong. *In re Chase, Ex parte Cooper* . . . . . p. 228

(4) *Held* : That where the Registrar is not required by the provisions of the Bankruptcy Act absolutely to refuse a bankrupt his discharge, he has a discretion under section 28 as to the amount of punishment to be inflicted, and it will require a very strong case to induce the Court of Appeal to interfere with the exercise of that discretion if the Registrar comes to a right conclusion on the facts. But if the Court of Appeal is of opinion that the conclusion come to by the Registrar as to the facts is erroneous, the Court of Appeal will vary his decision. *In re Payne, Ex parte Castle Mail Packet Company* . . . . . p. 270

(5) An order was made by the County Court Judge directing that the discharge of the bankrupts should be allowed as soon as a sufficient sum was paid to the trustee in the bankruptcy to make up a dividend of 5s. in the pound.

On appeal the objection was taken that the order in question was wrong in form.

*Held* : That the proper order to be made under the circumstances was that the discharge of the bankrupts should be granted subject to judgment being entered against them under section 28, sub-section (6), of the Bankruptcy Act, 1883, for such amount and under such conditions as set out in the order. *In re Small & Small, Ex parte Small & Small* . . . . . p. 296

**DISCOVERY.**—See *Document*.

DISCRETION.]—See *Registrar*.

DIVORCE COURT.]—See *Judgment Creditor*.

DOCUMENT—*Construction of*.]—*Held*: That it is a general good rule of construction that where, if nothing were said, there would be a general applied condition, if there is inserted in a document a specific and limited condition, such specific and limited condition was meant to take the place of the general condition.

Thus, where a deed of arrangement, by which a debtor agreed to pay his creditors their debts in full by certain quarterly instalments, contained a clause that if default be made for the space of twenty-one days in paying any one instalment, then, and in such case, it should be lawful for the trustee under the deed by notice in writing to declare such deed void, "and in such event the creditors shall be entitled to enforce their claims as if the said deed had never been made or executed."

*Held*: That the trustee not having given the said notice, a creditor under the deed was not entitled to serve a bankruptcy notice and present a petition on account of the debt due to him. *In re Clement, Ex parte Goas* . . . p. 153

*Discovery of*.]—Where application was made by a friendly creditor for discovery of documents, nominally for the purpose of carrying out proceedings to expunge a proof, but in reality for the purpose of reopening, after time for appeal had elapsed, the question as to whether the receiving order had been properly made against the bankrupt or not.

*Held*: That the application was an attempt by the contrivance of the creditor and the bankrupt, in the interest of the bankrupt, to use the process of the Court to do that which, if the bankrupt himself asked the Court, the Court would not allow to be done: and that the Registrar was quite right in refusing it. *In re Dashwood, Ex parte Kirk* . . . . . p. 257

DOMICIL—*Proof of*.]—*Held*: That although the onus is on the petitioning creditor to prove the English domicile of the debtor as required by section 6, sub-section 1 (d), of the Bankruptcy Act, 1883, and that the residence of the debtor has been such as to give the Court in which the petition is presented jurisdiction under section 95; nevertheless, if there is no reason to suppose that the debtor will dispute that his domicile is English, or that the petition is presented in the right Court, it is not necessary for the petitioning creditor in the first instance to adduce evidence of either of these facts. *In re Barne, Ex parte Barne* . . . . . p. 33

ELECTION OF LESSOR.]—See *Lease*.

EVIDENCE—*Vidē voce*.]—(1) *Held*: That an application to be allowed to give *vidē voce* evidence ought to be made beforehand, and not at the same time with the motion upon the hearing of which it is desired to use such evidence. *In re Genese, Ex parte Kearsley & Co.* . . . . . p. 57

(2) *Held*: That where in a case to be heard before the Judge in Bankruptcy it is desired to use *vivâ voce* evidence, the application for leave to give such *vivâ voce* evidence must be made beforehand to the Judge, and not to the Registrar. *In re Hagan & Co., Ex parte Adamson & Ronaldson* . . . p. 117

(3) Where it is desired to use *vivâ voce* evidence at the hearing of a motion, and both parties consent, a written notice to that effect may be given to the clerk of the Court, and application made to the Judge to fix a suitable day for the hearing.

But if both parties do not consent, the matter must come on as a motion in the ordinary way. *In re Underhill* . . . p. 282

*In support of Petition.*—*Held*: That where, upon the hearing of a bankruptcy petition against a debtor, the evidence requisite under section 7, sub-section (2), of the Bankruptcy Act, 1883, is adduced, it is not necessary, in the event of the hearing being adjourned, to give at such adjourned hearing similar evidence under the said sub-section. *In re Winby, Ex parte Winby* . . . p. 108

**EXECUTION—Against goods.**—(1) *Held*: That a charging order upon shares, made under the Statute 1 & 2 Vict. c. 110, s. 14, does not fall within section 45 of the Bankruptcy Act, 1883, and that the words in the said section, “an execution against the goods of a debtor,” which is to be completed by seizure and sale, do not include such an order. *In re Hutchinson, Ex parte Plowden & Co.* p. 19

(2) On March 11th the goods of the debtor were seized under a *fi. fa.*, and on March 17th they were sold by the sheriff by private contract under an order of the Court to that effect, but they were not removed from the premises by the purchaser until April 10th.

On March 23rd a bankruptcy petition was presented against the debtor, and on April 14th a receiving order was made.

On April 15th the landlords of the debtor’s premises served upon the sheriff a notice requiring him not to remove the goods from such premises until the sum of 116*l.* 8*s.*, arrears of rent due at Christmas, 1884, and Lady-day, 1885, had been paid to them.

The sheriff, under section 46, sub-section (2), of the Bankruptcy Act, 1883, handed to the trustee of the bankrupt’s estate the proceeds of the sale after deducting the usual costs of execution.

On an application for an order directing the sheriff to pay to the landlords the said sum of 116*l.* 8*s.*:

*Held*: That for the rent due at Christmas, 1884, the landlords might have distrained at any time between March 17th and April 10th; and for the rent due on March 25th, the sheriff who quitted the premises on March 17 was not responsible; and that, the landlords having failed to take advantage of the opportunity offered to them, the application must be dismissed with costs. *In re Davis* . . . p. 27

(3) On February 3rd, 1886, the sheriff having seized the goods of a debtor under an execution for more than twenty pounds, the debtor on February 4th, before sale, paid him the amount of the debt and costs.

Notice was given of this payment to the judgment creditors, who on February 11th assented to the payment and wrote to the sheriff for the money.

On February 13th a bankruptcy petition was presented against the debtor, who was adjudicated bankrupt thereon, and the trustee in the bankruptcy having laid claim to the money so paid, an order was obtained in the County Court directing the sheriff to hand over the amount to such trustee.

*Held* (on appeal): That the payment out by a debtor of an execution upon his goods is not a "sale" within the meaning of section 46, sub-section (2), of the Bankruptcy Act, 1883: that the money was received by the sheriff for the judgment creditors, who were entitled to it as against the trustee in the bankruptcy: and that the order of the County Court directing the sheriff to pay over the money to such trustee was wrong. *In re Pearson* . . . . . p. 187

**FEES.**—The proposal put forward by a debtor provided, that all the property of such debtor divisible among his creditors should vest in a trustee, and, subject to the provisions of the scheme, be administered according to the law of bankruptcy: that, in addition, the sum of 100*l.* a year out of a pension of 297*l.* belonging to the debtor should be paid to the trustee under the scheme until, with the rest of the debtor's property, all the costs relating to the bankruptcy should have been paid, and the creditors should have received 15*s.* in the pound upon the amount of their debts: that after payment of 15*s.* in the pound to the creditors upon their debts and of all the costs, charges, and expenses, the trustee should hand over to the debtor the surplus of the estate: and that as from the date of the confirmation of the scheme by the Court the debtor should be released and discharged from all debts provable under the bankruptcy.

On the debtor applying to the Court for its approval, the Registrar was in doubt whether such proposal required to be stamped as a composition or a scheme of arrangement, and the question was referred to the Judge for decision.

*Held*: That the arrangement in question had more of the elements of a scheme than of a composition; and that the fee must be paid on the estimated value of the 100*l.* a year as an asset. *In re Griffith* . . . . . p. 111

**FINAL JUDGMENT.**—(1) *Held*: That the assignee of a judgment debt is not "a creditor" who "has obtained a final judgment" against the judgment debtor within the meaning of section 4, sub-section 1 (g), of the Bankruptcy Act, 1883: and that such assignee is not entitled to issue a bankruptcy notice against the debtor in respect of the debt.

That the words of the said sub-section cannot be extended further than to the personal representative of the creditor who has obtained the judgment: and that the decision of the Court of Appeal in the case of *In re Woodall, Ex parte Woodall* (see *ante*, Volume I, page 201; L. R. 13 Q. B. D. 479), did not go further than to such personal representative. *In re Keeling, Ex parte Blanchett* . . . . . p. 157

(2) *Held*: That a "balance order" for the payment of calls upon shares, made on a contributory in the winding-up of a company, is not a "final judg-

ment" within the meaning of section 4, sub-section 1 (g), of the Bankruptcy Act, 1883, so as to enable the liquidator of the company to issue a bankruptcy notice against the contributory in respect of the amount ordered by the balance order to be paid.

The case of *In re Sanders, Ex parte Whinney* (see *ante*, Volume I., page 185 ; L. R. 13 Q. B. D. 476), approved and followed. *In re Tennant, Ex parte Grimwade* . . . . . p. 166

(3) *Held*: That a creditor who has obtained a final judgment cannot under section 4, sub-section 1 (g), of the Bankruptcy Act, 1883, issue a bankruptcy notice against the judgment debtor, unless such creditor is also in a position to issue immediate execution on the judgment. *In re Ide, Ex parte Ide* . p. 239

(4) On August 23rd, 1886, judgment was recovered against the debtor, and execution was issued under which the sheriff levied on August 26th.

On September 1st a third person having claimed the goods an interpleader order was obtained by the sheriff, under which the claimant paid 120*l.* into Court, and thereupon in pursuance of the order the sheriff withdrew from possession.

On September 20th the issue in the interpleader was settled, but on September 27th before such issue was decided the judgment creditor served on the debtor a bankruptcy notice under section 4, sub-section 1 (g) of the Bankruptcy Act, 1883.

On an appeal from the decision of the County Court registrar refusing to set aside this notice :

*Held*: That when the interpleader order was made, and an issue directed, it was in substance a stay of execution until such issue in the interpleader was decided : and that the creditor not being in a position to issue execution on the judgment was not entitled to serve a bankruptcy notice on the debtor at the date when such notice was served. *In re Ford, Ex parte Ford* . . . p. 283

**FRAUDULENT PREFERENCE.]**—On application by the trustee to declare void, on the ground of fraudulent preference, an assignment of certain patent rights and also the payment of a sum of money made by the debtor within three months of a bankruptcy petition being presented against him, to his uncle who had guaranteed the payment of a debt due from such debtor to another person, the objection was raised that the payment now sought to be set aside had been made in consequence of the guarantee and not "in favour of any creditor."

*Held*: That the assignment was clearly a fraudulent preference ; and that, on the facts of the case, the uncle of the debtor at the time of the payment of the said money to him being independently of the guarantee, a creditor for goods sold, such payment was also void under the section.

*Quere*: Whether if a debtor, within the time limited by the section, makes a payment to a person who has guaranteed a debt due from him to a third party, and which the surety has not then paid, such transaction can be set aside as being a payment made in favour of "any creditor" within section 48 of the Bankruptcy Act, 1883. *In re Bear* . . . . . p. 129



GAMBLING.]—See *Speculation*.

GARNISHEE.]—See *Attachment*.

GUARDIAN.]—Where it is desired to bring an infant before the Court the proper course is to apply for the appointment of a guardian *ad litem* for that purpose.

Where, on an appeal from a County Court, the Divisional Court in Bankruptcy directs such appeal to stand over in order that certain persons, some of whom are infants, may be made parties, it would appear that application for the appointment of a guardian *ad litem* should be made to the County Court. *In re Lovndes* . . . . . p. 216

INFANT.]—Where it is desired to bring an infant before the Court the proper course is to apply for the appointment of a guardian *ad litem* for that purpose.

Where, on an appeal from a County Court, the Divisional Court in Bankruptcy directs such appeal to stand over in order that certain persons, some of whom are infants, may be made parties, it would appear that application for the appointment of a guardian *ad litem* should be made to the County Court. *In re Lovndes* . . . . . p. 216

INSTALMENTS, PAYMENT BY.]—See *County Court*.

INTERIM RECEIVING ORDER.]—See *Official Receiver*.

INTERPLEADER.]—On August 23rd, 1886, judgment was recovered against the debtor, and execution was issued under which the sheriff levied on August 26th.

On September 1st a third person having claimed the goods, an interpleader order was obtained by the sheriff under which the claimant paid 120*l.* into Court, and thereupon in pursuance of the order the sheriff withdrew from possession.

On September 20th the issue in the interpleader was settled, but on September 27th, before such issue was decided, the judgment creditor served on the debtor a bankruptcy notice under section 4, sub-section 1 (g) of the Bankruptcy Act, 1883.

On an appeal from the decision of the County Court registrar refusing to set aside this notice:

*Held*: That when the interpleader order was made and an issue directed, it was in substance a stay of execution until such issue in the interpleader was decided; and that the creditor not being in a position to issue execution on the judgment was not entitled to serve a bankruptcy notice on the debtor at the date when such notice was served. *In re Ford, Ex parte Ford* . . . p. 283

"JUDGMENT CREDITOR."—*Held*: That where an order is made in the Divorce Court directing the co-respondent to pay to the husband, the petitioner in the suit, the amount given as damages forthwith for the purpose of settlement on the children of the marriage, such husband is not a "judgment creditor" of the co-respondent within the meaning of section 103, sub-section (5), of the Bankruptcy Act. *In re Fryer, Ex parte Fryer* . . . . . p. 231

JURISDICTION.]—(1) On June 8th, 1885, the manager of the debtor, without his knowledge, communicated to a firm of corn-factors, to whom the debtor was indebted for wheat then in his stores, the fact that the debtor was in difficulties, and the firm thereupon bought from the manager all the wheat in the debtor's stores on the usual credit terms.

On the same day the debtor sent out by post from another place notices of suspension of payment, which were delivered on the following morning to the creditors and also to the debtor's manager.

On the facts of the sale of the wheat coming to the knowledge of the debtor he repudiated the transaction, and it was subsequently set aside by the County Court Judge.

At the hearing it was objected that the claim did not arise out of the bankruptcy, and as the amount in dispute exceeded 200*l.*, and all parties did not consent, the County Court had no jurisdiction.

*Held* (on Appeal): That the claim did arise out of the bankruptcy: that but for the impending bankruptcy the transaction would never have taken place, and but for the actual bankruptcy it would never have been disputed: and that the decision of the County Court Judge was right. *In re Haykes, Ex parte Scott & Smith* . . . . . p. 1

(2) *Held*: That although the onus is on the petitioning creditor to prove the English domicile of the debtor as required by section 6, sub-section 1 (d), of the Bankruptcy Act, 1883, and that the residence of the debtor has been such as to give the Court in which the petition is presented jurisdiction under section 95; nevertheless, if there is no reason to suppose that the debtor will dispute that his domicile is English, or that the petition is presented in the right Court, it is not necessary for the petitioning creditor in the first instance to adduce evidence of either of these facts. *In re Barne, Ex parte Barne* . . . . . p. 33

(3) Where application was made, pending appeal, for a stay of proceedings on a warrant granted by a County Court, to a Divisional Court of the High Court of Justice of which the Judge to whom Bankruptcy business is assigned was not a member.

*Held*: That Mr. Justice CAVE not being a member of such Divisional Court it had no jurisdiction to hear and decide upon the application.

On application subsequently made to a Divisional Court sitting in Bankruptcy, a stay of proceedings granted. *In re Moon* . . . . . p. 74

(4) *Held*: That where an order is made by a Divisional Court in Bankruptcy on an appeal from a County Court and the Registrar of the County Court neglects or refuses to carry out such order, the Divisional Court has no original

jurisdiction to make an order on the County Court Registrar directing him to do so.

But where an order is made by a Divisional Court in Bankruptcy on an appeal from a County Court, the Registrar of the County Court ought to comply with such order forthwith, and has no right to refuse to comply with it until the time limited for appeal to the Court of Appeal has expired.

Thus, where the Divisional Court in Bankruptcy on an appeal from a County Court allowed the appeal, and gave leave to the unsuccessful respondent to appeal to the Court of Appeal, but made an order directing moneys in Court to be paid out, which the Registrar of the County Court declined to do until the time limited for appeal to the Court of Appeal had expired, and an order was in consequence made by the Divisional Court directing him to pay out the moneys in question together with costs, from which order the Registrar appealed :

*Held* : That the Registrar had no right to refuse to pay out the said moneys, there having been no stay of proceedings under the order of the Divisional Court pending appeal.

But the Registrar was an officer of the County Court : the order of the Divisional Court upon the appeal from the County Court was to be carried out by the County Court : and the Divisional Court had no jurisdiction to make such an order against the Registrar. *In re Wise, Ex parte Rowland* . . . p. 174

LANDLORD.]—(1) On March 11th the goods of the debtor were seized under a *fi. fa.*, and on March 17th they were sold by the sheriff by private contract under an order of the Court to that effect, but they were not removed from the premises by the purchaser until April 10th.

On March 23rd a bankruptcy petition was presented against the debtor, and on April 14th a receiving order was made.

On April 15th the landlords of the debtor's premises served upon the sheriff a notice requiring him not to remove the goods from such premises until the sum of 116*l.* 8*s.*, arrears of rent due at Christmas, 1884, and Lady-day, 1885, had been paid to them.

The sheriff under section 46, sub-section (2), of the Bankruptcy Act, 1883, handed to the trustee of the bankrupt's estate the proceeds of the sale after deducting the usual costs of execution.

On an application for an order directing the sheriff to pay to the landlords the said sum of 116*l.* 8*s.*

*Held* : That for the rent due at Christmas, 1884, the landlords might have distrained at any time between March 17th and April 10th ; and for the rent due on March 25th, the sheriff who quitted the premises on March 17th was not responsible ; and that, the landlords having failed to take advantage of the opportunity offered to them, the application must be dismissed with costs. *In re Davis* . . . . . p. 27

(2) When a lease contains a proviso or condition that on breach of any of the covenants such lease "shall cease, determine, and be void to all intents and purposes whatsoever," such words must be construed to mean void at the election of the lessor.

Thus, where a lease contained a proviso to the effect that if the lessee should become bankrupt or insolvent the lease "shall cease, determine, and be void," and, the lessee having become bankrupt, the trustee in the bankruptcy rejected a proof put in by the lessors founded on such lease, upon the ground that on the bankruptcy the lease became void.

*Held*: That such rejection by the trustee was wrong, and must be reversed.  
*In re Tickle* . . . . . p. 126

(3) See also *In re Hinks, Ex parte Verdi* . . . . . p. 218

LEASE.]—(1) When a lease contains a proviso or condition that on breach of any of the covenants such lease "shall cease, determine, and be void to all intents and purposes whatsoever," such words must be construed to mean void at the election of the lessor.

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(2) See also *In re Hinks, Ex parte Verdi* . . . . . p. 218

MARRIED WOMAN.]—*Held*: That the capacity to exercise a general power of appointing property is not property.

That the "separate property" referred to in section 1, sub-section (5) of the Married Women's Property Act, 1882, which provides that "Every married woman carrying on a trade separately from her husband, shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*," comprises only that which would be her property if she were a *feme sole*.

Thus, where, by a settlement, real property was vested in a trustee in trust for a married woman—who traded separately from her husband and became bankrupt—for life for her separate use, without restraint on anticipation, with remainder to such persons as she might, whether covert or sole, appoint, and with further trusts in default of appointment, the Court would not compel her to exercise in favour of the trustee in the bankruptcy such power of appointment. *In re Armstrong, Ex parte Armstrong* . . . . . p. 193

OFFICER.]—*Held*: That a compassionate allowance granted to a retired Indian officer by the Secretary of State for India under the powers conferred on him by the Government of India Act, 1858—which said allowance is not provided for in the regulations of the service, and the granting of it does not form one of the terms upon which the service was originally entered upon, but it is a mere act of grace—does not fall within the words of section 53, sub-section (2) of the

Bankruptcy Act, 1883, and the Court will not make an order under that section directing a certain sum to be paid thereout to the trustee in the bankruptcy of such officer for the purpose of distribution amongst his creditors. In order that section 53 may apply the payment must be one to which the bankrupt has a legal or equitable claim. *In re Webber, Ex parte Webber* . . . p. 288

**OFFICIAL RECEIVER.]—Held:** That although the words in section 40 of the Bankruptcy Act, 1883, which direct the payment in priority of “all wages or salary of any clerk or servant in respect of services rendered to the bankrupt during four months before the date of the receiving order,” apply to the four months immediately preceding the date of the receiving order, nevertheless, looking at the fact that one object of the Act was to secure and protect the wages of such clerks or servants, the Legislature must have intended to designate that date at which a bankrupt is deprived of all control over his property and the receipts cease to go into his hands, by the appointment of the official receiver as interim receiver.

Therefore, where a bankruptcy petition was presented against a debtor on March 7th, and the official receiver was appointed interim receiver on March 13th, but it was not until August 21st that a receiving order was made and the debtor adjudicated bankrupt; and the official receiver on August 27th paid to a servant of the bankrupt wages in full for four months preceding March 13th, and the trustee applied that the money so paid might be refunded by the official receiver, the application for such repayment was refused.

**Held:** That the proper course for the trustee to have pursued would have been to report the matter to the Board of Trade in accordance with the provisions of Rule 249 of the Bankruptcy Rules, 1883, and in the event of the Board of Trade declining to take the steps desired, to have moved the Court for an order directing the Board of Trade and the official receiver together to show cause why the moneys should not be refunded. *In re Smith* . . . p. 63

**Costs of.]—**That when the official receiver has made his report upon a composition or scheme of arrangement his duty is complete, and, except under very particular circumstances, he should not appear on an appeal: that if the appearance of the official receiver is essential, the Court will allow the appeal to stand over for that purpose: and that unless his appearance is requisite no costs will be allowed to him. *In re Reed, Bowen & Co.* . . . p. 90

**ORDER AND DISPOSITION.]—**See *Reputed Ownership*.

**PARTNERS—Bankruptcy of.]—**(1) On February 4th, 1886, a receiving order was made against one partner in the High Court; and on February 6th, 1886, the other partner presented a petition in a County Court.

On an application by the partner against whom a receiving order had been made in the High Court for an order to transfer the proceedings in the County Court against the other partner to the High Court.

*Held*: That the application for transfer ought to be made to the County Court.

That in any event the application was one which ought to have been made to the Registrar and not to the Judge in Court. *In re Nicholson* . . . p. 46

(2) Where final judgment is obtained against a firm, a bankruptcy notice cannot be issued against a member of such firm who has not been served with the writ, and has not appeared, or admitted that he is or has been adjudged to be a partner, unless under Order XLII., Rule 10, of the Rules of the Supreme Court, 1883, leave to issue execution against such partner has been obtained. *In re Ide, Ex parte Ide* . . . . . p. 239

*Proof against separate estate of.*—A testator by his will bequeathed so much of his government securities as would produce 250*l.* per annum to trustees for the benefit of his daughter, who subsequently became insane.

The trustees, after paying the expenses for the care of the lunatic, allowed a balance to accumulate, and the sum of 564*l.*, received by one of the trustees, was paid by him into a bank in which he was a partner.

The partnership firm became bankrupt, and a proof for the 564*l.* in question was lodged by the administrator of the said daughter, who was also a trustee under the will, against the separate estate of the bankrupt trustee.

*Held*: That proof against the separate estate must be admitted, but without prejudice to any right which the trustee in the bankruptcy might have to claim contribution from the bankrupt's co-trustees. *In re Ridgway, Ex parte Mein* . . . . . p. 212

**PAWN OR PLEDGE.**—*Held*: That where a transaction is one of pawn or pledge, by which goods are deposited by the pledgor with the pledgee as security for the payment of money then advanced by the pledgee to the pledgor, such transaction is not within the Bills of Sale Acts; and a document signed at the time by the pledgor, recording the transaction and regulating the rights of the pledgee as to the sale of the goods, is not a bill of sale within the meaning of the said Acts.

That the effect of the decision in the case of *In re Townsend, Ex parte Parsons* (see *ante*, page 36: L. R. 16 Q. B. D. 532) was to determine that an authority to take possession of goods as security for the payment of money is not exempted from the Bills of Sale Acts because it is an authority to take immediate possession: and that a transaction which is contrary to the Bills of Sale Acts is not taken out of the operation of such Acts because from its nature such transaction cannot be expressed in the statutory form of a bill of sale. *In re Hardwick, Ex parte Hubbard* . . . . . p. 246

**"PERSON AGGRIEVED."**—*Held*: That an unpaid creditor is a "person aggrieved" within the meaning of section 104, sub-section (2), of the Bankruptcy Act, 1883, by the granting of an order of discharge to a bankrupt, and as such has a right of appeal against such order. *In re Payne* . . . . . p. 270

PETITION—*By debtor.*—See *In re Walker* . . . . . p. 69

*By creditor.*—See (1) *In re Winby* . . . . . p. 108

(2) *In re Strick* . . . . . p. 78

POWER OF APPOINTMENT.]—See *In re Armstrong* . . . . . p. 193

PRIVILEGE OF WITNESS.]—*Held*: That where a question is in form an innocent one, it is not a sufficient ground of refusal to answer for a witness to say that he believes his answer to such question will or may criminate him: but he must satisfy the Court that there is a reasonable probability that it would or might do so. A witness in such a case must satisfy the Court by some fact outside the question that his answer will or may put him in jeopardy. *In re Genese, Ex parte Gilbert* . . . . . p. 223

PROCESS.]—See *Abuse of Process*.

PROOF—*Amendment of.*—(1) *Held*: That although the time allowed for appeal in bankruptcy matters may be extended by the Court, yet some ground must always be shown why this should be done, and notwithstanding the fact that when a *bond fide* mistake has been committed in the estimation of a proof, the trustee in the bankruptcy ought not to be permitted to take a technical advantage of such mistake, where a creditor for more than a year and a half took no steps to reverse the decision of the County Court Judge refusing to allow such creditor to amend or withdraw his proof alleged to be so wrongly estimated, the Court could not permit him to reopen the case for the purpose of setting aside that decision. *In re Tricks, Ex parte Charles* . . . . . p. 15

(2) *Held*: That where a valuation was put upon a security by a creditor which, owing to the death of the bankrupt, greatly increased in value, such creditor was entitled to amend his valuation under Rule 13 of Schedule II. of the Bankruptcy Act, 1883, notwithstanding that the trustee in the bankruptcy had stated to the creditor that he intended to purchase the security at his valuation, but the purchase-money had not been paid.

That the words of the said Rule 13, which provides that a secured creditor may amend the valuation of his security made in his proof of debt "at any time," are to be limited to the extent that the right cannot be exercised after the trustee in the bankruptcy has actually paid for the security at the valuation set upon it by the creditor.

A further limitation may also arise if, under Rule 12 (c) of Schedule II., the creditor, by notice in writing, puts the trustee to his election whether he will redeem the security or not, and the trustee has declared his election to purchase the security at the creditor's valuation. *In re Sadler, Ex parte Norris* . . p. 260

*Rejection of.*—(1) Where on an appeal from the rejection of a proof by the trustee the objection is taken that such rejection was not made within the fourteen days required by Rule 173 of the Bankruptcy Rules, 1883, the Court will allow such objection, but will treat the application as a motion to expunge the proof on behalf of the trustee, and will deal with the case accordingly. *In re Voght, Ex parte Spamer* . . . . . p. 164

(2) *Held*: That although by section 89, sub-section (1), of the Bankruptcy Act, 1883, a trustee shall, in the administration of the property of the bankrupt and in the distribution thereof amongst his creditors, have regard to any directions which may be given by the committee of inspection; nevertheless, if such trustee unreasonably and vexatiously rejects a proof of debt, the Court will order him to pay personally the costs occasioned by such rejection, even though in so doing he acted under the directions of the committee.

Where the view taken by a committee of inspection upon any question is frivolous and wasteful of the assets, the trustee is not justified in acting upon it, and cannot set up the directions of such committee as a defence against a personal order upon him to pay costs.

That a trustee ought not to reject a proof tendered in respect of a debt, for which a judgment by consent has been obtained, merely on the ground that a copy not having been filed as required by section 27 of the Debtors Act, 1869, the judgment or any execution issued or taken out thereon is void; but in such case the trustee ought to investigate the validity of the alleged debt. *In re Smith, Ex parte Brown* . . . . . p. 202

*For Costs.*—On July 15th, 1884, an order was made by consent by which all matters in dispute in an action were referred to arbitration, the costs to be in the discretion of the said arbitrator.

On November 15th, 1884, during the continuance of the arbitration proceedings, the defendant debtor became bankrupt, and on January 21st, 1885, the trustee in the bankruptcy wrote to the arbitrator as follows:—"I give you notice that I as trustee deny any agreement of reference or that any award therein is or will be binding on me, and so far as I have the power I revoke your authority."

On February 26th, 1885, the arbitrator gave his decision, by which he awarded to the plaintiff in the action a certain sum, and ordered that all costs should be paid by the defendant.

A proof for the said costs having been rejected by the trustee in the bankruptcy and also by the County Court Judge.

*Held* (on appeal): That the bankruptcy did not operate as a revocation of the submission: that the trustee had no power to revoke the authority: and that the creditor was entitled to prove for the costs in question. *In re Smith, Ex parte Edwards* . . . . . p. 179

*Against Separate Estate.*—A testator by his will bequeathed so much of his government securities as would produce 250*l.* per annum to trustees for the benefit of his daughter, who subsequently became insane.

The trustees, after paying the expenses for the care of the lunatic, allowed a balance to accumulate, and the sum of 564*l.*, received by one of the trustees, was paid by him into a bank in which he was a partner.



The partnership firm became bankrupt, and a proof for the 564*l.* in question was lodged by the administrator of the said daughter, who was also a trustee under the will, against the separate estate of the bankrupt trustee.

*Held*: That proof against the separate estate must be admitted, but without prejudice to any right which the trustee in the bankruptcy might have to claim contribution from the bankrupt's co-trustees. *In re Ridgway* . . . p. 212

*For Contingency.*—The assignee of a lease of certain premises having become bankrupt and rent being in arrear judgment for the same was recovered against his assignor who was under covenant to pay such rent.

The assignor thereupon proved against the estate of the bankrupt for the amount so paid; and also sought to prove in respect of his contingent liability for the rent during the time the said lease had yet to run.

The last-mentioned proof was rejected by the trustee in the bankruptcy.

*Held*: That the proof must be admitted: and that an estimate must be made by the trustee in the bankruptcy of the value of the liability under section 37, sub-section (4), of the Bankruptcy Act, 1883. *In re Hinks, Ex parte Verdi* . . . . . p. 218

"RASH AND HAZARDOUS."—See *Speculation*.

"RECEIPT OF DEBT."—Where a judgment creditor obtained a garnishee order in respect of a debt due to the judgment debtor, and a dispute having arisen, payment into Court of the debt to abide further order was directed, and the judgment debtor subsequently became bankrupt.

*Held*: That such payment into Court to abide further order did not constitute a "receipt of the debt" by which an attachment is completed within section 45, sub-section (2), of the Bankruptcy Act, 1883.

That the meaning and intention of the legislature by the Bankruptcy Act, 1883, was to get rid of all questions which might have arisen before that Act was passed, and to put the law upon a very simple and plain foundation: and that a judgment creditor having attached a debt does not become entitled to retain it unless he has received the debt before the bankruptcy. *Butler v. Wearing* . . . . . p. 5

RECEIVING ORDER.]—(1) On February 19th, 1885, a petition was presented against the debtor in the London Bankruptcy Court, but the hearing of such petition was subsequently adjourned from time to time with the consent of the petitioning creditor.

On January 5th, 1886, a receiving order was made on this petition in the High Court at 11.30 o'clock, and on the same day at 1 o'clock, a receiving order was also made against the debtor in the Swansea County Court at the instance of another creditor.

On an appeal by the creditor presenting the petition in London to set aside such Order of the County Court.

*Held*: That from the evidence it appeared clear that the legitimate business of the debtor was carried on in Swansea, which was *prima facie* the place where his business transactions ought to be investigated: and that the petitioning creditor in London having for his own purposes delayed for several months to proceed with his petition, the proper course for the Court to pursue was not to

interfere with the order of the County Court, and application to be made to the London Court to stay the proceedings there. *In re Strick, Ex parte Martin* . . . . . p. 78

*In lieu of Committal.*—See *In re Fryer, Ex parte Fryer* . . . . . p. 231

**REGISTRAR—Duty of.**—(1) It is the duty of the registrar to hear and determine an application made *ex parte* for an injunction, even though at the time of such application the Judge in Bankruptcy may be sitting. *In re Brooks* . p. 62

(2) *Held*: That it is the duty of the registrar to hear and decide those cases brought before him, and which he is not prevented from so deciding by any order of the Judge, or by the Rules or Statute: and that the registrar, without good cause, and except on the ground of novelty or difficulty, ought not to adjourn any such case for the purpose of its being heard before the Judge in Bankruptcy. *In re Webster* . . . . . p. 132

(3) *Held*: That where an order is made by a Divisional Court in Bankruptcy on an appeal from a County Court and the registrar of the County Court neglects or refuses to carry out such order, the Divisional Court has no original jurisdiction to make an order on the County Court registrar directing him to do so.

But where an order is made by a Divisional Court in Bankruptcy on an appeal from a County Court, the registrar of the County Court ought to comply with such order forthwith, and has no right to refuse to comply with it until the time limited for appeal to the Court of Appeal has expired.

Thus, where the Divisional Court in Bankruptcy on an appeal from a County Court allowed the appeal, and gave leave to the unsuccessful respondent to appeal to the Court of Appeal, but made an order directing moneys in Court to be paid out, which the registrar of the County Court declined to do until the time limited for appeal to the Court of Appeal has expired, and an order was in consequence made by the Divisional Court directing him to pay out the moneys in question together with costs, from which order the registrar appealed.

*Held*: That the registrar had no right to refuse to pay out the said moneys, there having been no stay of proceedings under the order of the Divisional Court pending appeal.

But the registrar was an officer of the County Court: the order of the Divisional Court upon the appeal from the County Court was to be carried out by the County Court: and the Divisional Court had no jurisdiction to make such an order against the registrar. *In re Wise* . . . . . p. 174

*Discretion of.*—See (1) *In re Reed, Bowen & Co., Ex parte Bowen & Co.* p. 90

(2) *In re Badcock, Ex parte Badcock* . . . . . p. 138

(3) *In re Postlethwaite, Ex parte Ledger* . . . . . p. 169

(4) *In re Chase, Ex parte Cooper* . . . . . p. 228

(5) *In re Payne, Ex parte Castle Mail Packet Co.* . p. 270

(6) *In re Genese, Ex parte Kearsley & Co.* . . . . . p. 274

(7) *In re Barlow, Ex parte Thornber* . . . . . p. 304

(8) See also *Discharge—Composition—Scheme of Arrangement.*

**REPUTED OWNERSHIP.]—(1) Held:** That upon the evidence given there is no custom in the furniture trade to deliver goods to dealers upon "sale or return" so as to prevent the operation of the reputed ownership clause—section 44, sub-section (iii.), of the Bankruptcy Act, 1883.

The applicants deposited with the debtor certain Oriental antiquities and curiosities, carpets, rugs, and other articles upon the terms of "sale or return," which goods were in the possession of the debtor at the time of the bankruptcy, and were retained by the trustee.

**Held:** That when a custom is sought to be established, it lies upon the persons who affirm the existence of the custom to make it out; and that although a practice is undoubtedly creeping into the furniture trade of sending goods on sale or return, the evidence given was not sufficient to justify the Court in saying that the custom is an established one, and so common and notorious that a person making enquiry of those cognisant of the trade would be told there was no doubt of such custom. *In re Horn, Ex parte Nassau* . . . p. 51

(2) Where a cattle-dealer placed certain stock on the lands of a farmer upon an agreement whereby such stock remained the property of the dealer, who at the end of the fixed period was to sell the stock, and, after deducting the original price together with a percentage for profit, was to hand over the balance to the farmer: and during the continuance of the agreement the farmer became bankrupt, whereupon the trustee in the bankruptcy claimed the stock in question as being in the reputed ownership of the bankrupt within section 44, sub-section (iii.), of the Bankruptcy Act, 1883.

**Held:** That the custom of agistment was notorious and one which the ordinary creditors of the bankrupt might reasonably be presumed to have known: and that such being the case no reputation of ownership could arise with respect to the stock upon the lands of a farmer. *In re Woodward, Ex parte Huggins* . p. 75

(3) **Held:** That shares in a railway company are "things in action" within the meaning of section 44, sub-section (iii.) of the Bankruptcy Act, 1883, so as to be excepted from the doctrine of reputed ownership.

Where a partner in a stockbroking firm purchased shares in a railway company with money of the firm, and subsequently deposited the share certificates with the firm's bankers as security or cover for advances made by them to the firm, and before notice of the deposit had been given to the railway company, the firm, and also the members of it, were adjudicated bankrupts.

**Held:** That the trustee in the bankruptcy was not entitled to such shares as being in the reputed ownership of the bankrupts within section 44, sub-section (iii.) of the Bankruptcy Act.

**Quere:** Whether the term "choses in action" does not now include all personal chattels not in possession. *Colonial Bank v. Whinney* . . . p. 207

**SCHEME OF ARRANGEMENT.]—See also Composition.**

(1) **Held:** That the action of the legislature by section 18 of the Bankruptcy Act, 1883, in taking away from the majority of creditors the power which they formerly possessed, and in putting into the hands of the Court the controlling power in the case of a composition or scheme of arrangement, was for the

purpose of protecting such creditors themselves against their own recklessness : for preventing a majority of creditors from dealing recklessly not only with their own property but with that of the minority of creditors : and for the purpose of enforcing, so far as the legislature could, a more careful and moral conduct on the part of persons who eventually become insolvent debtors.

That in deciding as to the granting or refusing the approval of the Court to a composition or scheme of arrangement, the question whether the debtor has kept proper books is one of primary importance : and that the neglect of a trader to have books properly kept and balanced from time to time, so that the real state of his affairs may at once appear, is a serious offence.

That where, by the provisions of the proposed scheme, the control of the business is left in the hands of the debtors who have been proved to have previously carried on their business in a reckless and improper manner, the Court ought to refuse its approval to such scheme, on the ground that it would not trust with the control of the business persons who had shown themselves unworthy to be trusted to carry on any business with reasonable care and attention.

That when the official receiver has made his report upon a composition or scheme of arrangement his duty is complete, and, except under very particular circumstances, he should not appear on an appeal : that if the appearance of the official receiver is essential, the Court will allow the appeal to stand over for that purpose : and that unless his appearance is requisite no costs will be allowed to him. *In re Reed, Bowen & Co.* . . . . . p. 90

(2) The proposal put forward by a debtor provided, that all the property of such debtor divisible among his creditors should vest in a trustee, and, subject to the provisions of the scheme, be administered according to the law of bankruptcy : that, in addition, the sum of 100*l.* a year out of a pension of 297*l.* belonging to the debtor should be paid to the trustee under the scheme until, with the rest of the debtor's property, all the costs relating to the bankruptcy should have been paid, and the creditors should have received 15*s.* in the pound upon the amount of their debts : that after payment of 15*s.* in the pound to the creditors upon their debts and of all the costs, charges, and expenses, the trustee should hand over to the debt or the surplus of the estate : and that as from the date of the confirmation of the scheme by the Court the debtor should be released and discharged from all the debts provable under the bankruptcy.

On the debtor applying to the Court for its approval, the Registrar was in doubt whether such proposal required to be stamped as a composition or a scheme of arrangement, and the question was referred to the Judge for decision.

*Held* : That the arrangement in question had more of the elements of a scheme than of composition ; and that the fee must be paid on the estimated value of the 100*l.* a year as an asset. *In re Griffith* . . . . . p. 111

(3) *Held* : That the term "trustee" in section 27 of the Bankruptcy Act, 1883, which provides that the Court may, on the application of the official receiver or trustee, at any time after a receiving order has been made against a debtor, summon before it persons for the purpose of discovery of the debtor's property, does not include a trustee under a scheme of arrangement of a debtor's

affairs accepted by the creditors and approved by the Court under section 18 of the Act. *In re Grant, Ex parte Whinney* . . . . . p. 118

(4) On an appeal by the petitioning creditor from an order of the Court approving a scheme of arrangement put forward by the debtor, on the ground that by reason of the conduct of such debtor the Court, if he were adjudged bankrupt, would be required to refuse his discharge ; or that, at any rate, such facts had been proved against him as would justify the Court in the case of bankruptcy in refusing, qualifying, or suspending the discharge.

*Held* : That there was no evidence of any offence committed by the debtor which would under the Act require the Court to refuse the discharge.

That the words of section 18, sub-section (6), of the Bankruptcy Act, 1883—" If any such facts are proved as would under this Act justify the Court in refusing, qualifying, or suspending the debtor's discharge, the Court may, in its discretion, refuse to approve the composition or scheme"—show that in such case it is in the discretion of the Court whether it will refuse to approve a scheme or not : that all matters must be duly weighed by the Court and discretion exercised : and that the decision of the Court will not be set aside on appeal unless it is manifestly wrong. *In re Postlethwaite, Ex parte Ledger* . . . . . p. 169

SECURED CREDITOR.]—See *In re Sadler, Ex parte Norris* . . . . . p. 260

SEPARATE PROPERTY.]—*Held* : That the capacity to exercise a general power of appointing property is not property.

That the "separate property" referred to in section 1, sub-section (5) of the Married Women's Property Act, 1882, which provides that "Every married woman carrying on a trade separately from her husband, shall in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*," comprises only that which would be her property if she were a *feme sole*.

Thus, where by a settlement, real property was vested in a trustee in trust for a married woman—who traded separately from her husband and became bankrupt,—for life for her separate use, without restraint on anticipation, with remainder to such persons as she might, whether covert or sole, appoint, and with further trusts in default of appointment, the Court would not compel her to exercise in favour of the trustee in the bankruptcy such power of appointment. *In re Armstrong* . . . . . p. 193

SHARES.]—*Held* : That shares in a railway company are "things in action" within the meaning of section 44, sub-section (iii.), of the Bankruptcy Act, 1883, so as to be excepted from the doctrine of reputed ownership. *Colonial Bank v. Whinney* . . . . . p. 207

*Charging order on.*—*Held*: That a charging order upon shares, made under Statute 1 & 2 Vict. c. 110, s. 14, does not fall within section 45 of the Bankruptcy Act, 1883, and that the words in the said section, "an execution against the goods of a debtor," which is to be completed by seizure and sale, do not include such an order. *In re Hutchinson, Ex parte Plowden & Co.* . . . p. 19

**SHERIFF.**—See *Execution—Interpleader.*

**SPECIAL CASE.**—See (1) *In re Walker* . . . . . p. 69

(2) *In re Moon* . . . . . p. 105

**SPECULATION.**—*Held*: That the term "rash and hazardous speculations" in section 28, sub-section 3 (d), of the Bankruptcy Act, 1883, is not confined to rash and hazardous speculations in trade, but the term also includes other speculations of a rash and hazardous nature, such as gaming, betting, and Stock Exchange transactions. *In re Barlow, Ex parte Thornber* . . . . . p. 304

**STAY—Of execution.**—See (1) *In re Ford, Ex parte Ford* . . . . . p. 283

(2) See also cases under *Final Judgment.*

*Of proceedings.*—See *In re Moon* . . . . . p. 74

**SURETY—Payment to.**—On application by the trustee to declare void, on the ground of fraudulent preference, an assignment of certain patent rights and also the payment of a sum of money made by the debtor within three months of a bankruptcy petition being presented against him, to his uncle who had guaranteed the payment of a debt due from such debtor to another person, the objection was raised that the payment now sought to be set aside had been made in consequence of the guarantee and not "in favour of any creditor."

*Held*: That the assignment was clearly a fraudulent preference; and that, on the facts of the case, the uncle of the debtor at the time of the payment of the said money to him being independently of the guarantee, a creditor for goods sold, such payment was also void under the section.

*Quere*: Whether if a debtor, within the time limited by the section, makes a payment to a person who has guaranteed a debt due from him to a third party, and which the surety has not then paid, such transaction can be set aside as being a payment made in favour of "any creditor" within section 48 of the Bankruptcy Act, 1883. *In re Bear* . . . . . p. 129

**TIME.**—See also *Delay.*

Where on an appeal from the rejection of a proof by the trustee the objection is taken that such rejection was not made within the fourteen days required by

Rule 173 of the Bankruptcy Rules, 1883, the Court will allow such objection, but will treat the application as a motion to expunge the proof on behalf of the trustee, and will deal with the case accordingly.

The case of *In re Sisling, Ex parte Fenton* (see ante, Volume II., page 289), followed. *In re Voght, Ex parte Spamer* . . . . . p. 164

**TRANSFER OF PROCEEDINGS.]**—On February 4th, 1886, a receiving order was made against one partner in the High Court; and on February 6th, 1886, the other partner presented a petition in a County Court.

On an application by the partner against whom a receiving order had been made in the High Court for an order to transfer the proceedings in the County Court against the other partner to the High Court.

*Held*: That the application for transfer ought to be made to the County Court.

That in any event the application was one which ought to have been made to the Registrar and not to the Judge in Court. *In re Nicholson* . . . p. 46

**TRUSTEE.]**—See also *Costs*.

*Motion to declare rights of.]—Held*: That when a trustee in a bankruptcy is of opinion that a motion to declare his rights should not be made and a creditor desires the motion to be made, the proper course is to make a preliminary motion to the Court for leave to use the name of the trustee on giving him an indemnity. *In re Genese* . . . . . p. 57

*Under scheme of arrangement.]—Held*: That the term "trustee" in section 27 of the Bankruptcy Act, 1883, which provides that the Court may, on the application of the official receiver or trustee, at any time after a receiving order has been made against a debtor, summon before it persons for the purpose of discovery of the debtor's property, does not include a trustee under a scheme of arrangement of a debtor's affairs accepted by the creditors and approved by the Court under section 18 of the Act. *In re Grant* . . . . . p. 118

*Duty of on appeal.]—Where*, in a case of any legal difficulty, a trustee in a bankruptcy has obtained the decision of the Court, if such trustee appeals from the decision given and does not succeed, the order for costs will be made against him personally.

A trustee, therefore, before appealing from such decision, ought to obtain the consent of the creditors to do so, and also to obtain a guarantee from such creditors for his own protection in the event of the appeal being decided against him. *In re Malden, Gibson & Co.* . . . . . p. 185

*Criminal proceedings against.]—Where* after the annulment of bankruptcy proceedings, application was made by the bankrupt for an order against the trustee to deliver up books and papers and a statement of account, the said trustee, with the solicitors and committee of inspection, having been indicted by the bankrupt

for conspiracy in bringing about the bankruptcy with intent to defraud, which indictment was then pending.

*Held*: That in the face of the criminal proceedings the application could not then be allowed; and that the proper course under the circumstances was to order the case to stand over until after the trial upon the indictment had taken place, or until his abandonment. *In re Palmer* . . . . . p. 267

**ULTRA VIRES.**—Upon an appeal from a County Court the preliminary objection was taken that the money or money's worth involved did not amount to 50*l.*, and that no leave to appeal had been obtained.

Against this objection it was argued that Rule 111 (2) of the Bankruptcy Rules, 1883, by which the said limitation is made, was *ultra vires*.

*Held*: That the language of the Bankruptcy Act was clear with reference to the power to make rules, subject to the proviso that such rules shall not extend the jurisdiction of the Court: that the said Rule 111, regulating appeals, was not *ultra vires*: and that the appeal must be dismissed with costs. *In re Hann, Ex parte Foreman* . . . . . p. 300

**VIVA VOCE EVIDENCE.**—(1) *Held*: That an application to be allowed to give *vivâ voce* evidence ought to be made beforehand; and not at the same time with the motion upon the hearing of which it is desired to use such evidence.

*In re Genese* . . . . . p. 57

(2) *Held*: That where in a case to be heard before the Judge in Bankruptcy it is desired to use *vivâ voce* evidence, the application for leave to give such *vivâ voce* evidence must be made beforehand to the Judge, and not to the Registrar.

*In re Hagan & Co.* . . . . . p. 117

(3) Where it is desired to use *vivâ voce* evidence at the hearing of a motion, and both parties consent, a written notice to that effect may be given to the clerk of the Court, and application made to the Judge to fix a suitable day for the hearing.

But if both parties do not consent, the matter must come on as a motion in the ordinary way. *In re Underhill* . . . . . p. 282

**WAGES—Of Clerk or Servant.**—*Held*: That although the words in section 40 of the Bankruptcy Act, 1883, which direct the payment in priority of "all wages or salary of any clerk or servant in respect of services rendered to the bankrupt during four months before the date of the receiving order," apply to the four months immediately preceding the date of the receiving order, nevertheless, looking at the fact that one object of the Act was to secure and protect the wages of such clerks or servants, the Legislature must have intended to designate that date at which a bankrupt is deprived of all control over his property and the receipts cease to go into his hands, by the appointment of the official receiver as interim receiver.

Therefore, where a bankruptcy petition was presented against a debtor on



March 7th, and the official receiver was appointed interim receiver on March 13th, but it was not until August 21st that a receiving order was made and the debtor adjudicated bankrupt; and the official receiver on August 27th paid to a servant of the bankrupt wages in full for four months preceding March 13th, and the trustee applied that the money so paid might be refunded by the official receiver, the application for such repayment was refused.

*Held*: That the proper course for the trustee to have pursued would have been to report the matter to the Board of Trade in accordance with the provisions of Rule 249 of the Bankruptcy Rules, 1883, and in the event of the Board of Trade declining to take the steps desired, to have moved the Court for an order directing the Board of Trade and the official receiver together to show cause why the moneys should not be refunded. *In re Smith* . . . p. 63

WITNESS—*Examination of.*]—(1) *Held*: That the term “trustee” in section 27 of the Bankruptcy Act, 1883, which provides that the Court may, on the application of the official receiver or trustee, at any time after a receiving order has been made against a debtor, summon before it persons for the purpose of discovery of the debtor’s property, does not include a trustee under a scheme of arrangement of the debtor’s affairs accepted by the creditors and approved by the Court under section 18 of the Act. *In re Grant, Ex parte Whinney* p. 118

(2) *Held*: That where a question is in form an innocent one, it is not a sufficient ground of refusal to answer for a witness to say that he believes his answer to such question will or may criminate him: but he must satisfy the Court that there is a reasonable probability that it would or might do so.

A witness in such a case must satisfy the Court by some fact outside the question that his answer will or may put him in jeopardy. *In re Genese, Ex parte Gilbert* . . . . . p. 223

## NOTE.

## CASES OVERRULED.

The case of *In re Wise, Ex parte Brown*, reported at p. 123 of this Volume, is overruled as to the question of jurisdiction of the Divisional Court by the case of *In re Wise, Ex parte Rowland*, reported at p. 174.

The decision in the case of the *Colonial Bank v. Whinney* reported in Volume II. at p. 234, is overruled by the *Colonial Bank v. Whinney* reported at p. 207 of the present Volume.

END OF VOL. III.







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